

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 SAN JOSE DIVISION

4 UNITED STATES OF AMERICA,) CR-18-00258-EJD &
5) CV-18-01603-EJD
6 PLAINTIFF,)
7 VS.) SAN JOSE, CALIFORNIA
8 ELIZABETH A. HOLMES AND RAMESH) JUNE 28, 2019
9 SUNNY BALWANI,)
10 DEFENDANTS.) PAGES 1 - 71
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SECURITIES AND EXCHANGE)
COMMISSION,)
PLAINTIFF,)
VS.)
RAMESH SUNNY BALWANI,)
DEFENDANT.)
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

APPPEARANCES:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN BOSTIC
ROBERT LEACH
JEFFREY SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP
BY: KEVIN M. DOWNEY
LANCE WADE
725 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20005

LAW OFFICE OF JOHN D. CLINE
BY: JOHN D. CLINE
ONE EMBARCADERO CENTER, SUITE 500
SAN FRANCISCO, CALIFORNIA 94111

FOR DEFENDANT BALWANI: DAVIS, WRIGHT & TREMAINE LLP
BY: STEPHEN CAZARES
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CALIFORNIA 94111

CORR CRONIN LLP
BY: STEVEN FOGG
1001 FOURTH AVENUE, SUITE 3900
SEATTLE, WASHINGTON 98154

1 SAN JOSE, CALIFORNIA JUNE 28, 2019

2 P R O C E E D I N G S

10:05AM 3 (COURT CONVENED AT 10:05 A.M.)

10:05AM 4 (COURT CONVENED AT 10:05 A.M.)

10:05AM 5 THE COURT: THIS IS 18-258, UNITED STATES VERSUS

10:05AM 6 ELIZABETH HOLMES AND UNITED STATES VERSUS RAMESH SUNNY BALWANI.

10:05AM 7 THERE'S A COMPANION CASE 18-1603 WHICH IS THE S.E.C. CASE,

10:06AM 8 AND WE'LL TURN TO THAT IN JUST A MOMENT.

10:06AM 9 MAY I HAVE THE APPEARANCES, PLEASE.

10:06AM 10 MR. BOSTIC: GOOD MORNING, YOUR HONOR. JOHN BOSTIC,

10:06AM 11 JEFF SCHENK, AND BOB LEACH FOR THE UNITED STATES.

10:06AM 12 THE COURT: THANK YOU. GOOD MORNING.

10:06AM 13 MR. DOWNEY: GOOD MORNING, YOUR HONOR. KEVIN DOWNEY

10:06AM 14 FROM WILLIAMS & CONNOLLY FOR MS. HOLMES AND WITH ME ARE

10:06AM 15 PARTNER, LANCE WADE, AND OUR CO-COUNSEL, JOHN CLINE.

10:06AM 16 THE COURT: THANK YOU. GOOD MORNING.

10:06AM 17 MR. CAZARES: GOOD MORNING, YOUR HONOR.

10:06AM 18 STEPHEN CAZARES FOR MR. BALWANI. WITH ME IS MR. STEVEN FOGG

10:06AM 19 WHO ALSO REPRESENTS MR. BALWANI.

10:06AM 20 THE COURT: THANK YOU. GOOD MORNING.

10:06AM 21 LET ME JUST THANK COUNSEL FOR -- WE DID RESCHEDULE THIS TO

10:06AM 22 THIS MORNING FROM -- I ADVANCED IT FROM MONDAY, AND LET ME

10:06AM 23 THANK YOU FOR THAT COURTESY.

10:06AM 24 WELL, TODAY WE HAVE A MOTION TO COMPEL REGARDING DISCOVERY

10:06AM 25 MATTERS. WE HAD SOME DISCUSSIONS ABOUT DISCOVERY WHEN WE WERE

10:06AM 1 LAST IN COURT AND THERE WAS SOME REPRESENTATIONS MADE.

10:06AM 2 I SUPPOSE -- LET ME INDICATE WHAT I HAVE REVIEWED HERE. I

10:06AM 3 HAVE REVIEWED YOUR PLEADINGS IN THIS CASE WHICH INCLUDE

10:07AM 4 DOCUMENT 67, WHICH IS THE MOTION TO COMPEL; DOCUMENT 79, WHICH

10:07AM 5 IS THE GOVERNMENT'S OPPOSITION; DOCUMENT 81, WHICH IS THE

10:07AM 6 REPLY, DEFENSE REPLY, AND ALL OF THE ATTACHMENTS THERETO;

10:07AM 7 DOCUMENT 82 IS MR. BALWANI'S REPLY; DOCUMENT 81-1 IS THE

10:07AM 8 DECLARATION OF MR. WADE IN FURTHER SUPPORT OF THE MOTION TO

10:07AM 9 COMPEL.

10:07AM 10 I'VE LOOKED ALSO AT THE JOINDER FILED BY MR. BALWANI AND

10:07AM 11 THAT WAS DOCUMENT 68; AND DOCUMENT 88, FINALLY, IS THE JOINT

10:07AM 12 SUPPLEMENTAL CASE MANAGEMENT STATEMENT; AND DOCUMENT 80 IS THE

10:07AM 13 JOINT STATEMENT.

10:07AM 14 HAVE I LEFT ANYTHING OUT THAT EITHER PARTY WANTS TO DRAW

10:07AM 15 MY ATTENTION TO?

10:07AM 16 MR. BOSTIC: NO, YOUR HONOR, NOT FOR THE GOVERNMENT.

10:07AM 17 THANK YOU VERY MUCH.

10:07AM 18 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

10:08AM 19 WELL, WHY DON'T I GET AN UPDATE, IF I MAY AS TO -- PARDON

10:08AM 20 ME. BEFORE WE DO THAT, I DO WANT TO DO ONE THING. I'D LIKE TO

10:08AM 21 SET THE CASE FOR TRIAL. SO WHY DON'T WE GET OUR CALENDARS OUT

10:08AM 22 AND LET'S LOOK AND SEE WHAT WOULD BE APPROPRIATE FOR THAT.

10:08AM 23 I DID READ IN YOUR STATEMENTS THAT YOU'RE SUGGESTING

10:08AM 24 SEPTEMBER OF NEXT YEAR AS A DATE FOR TRIAL. I APPRECIATE THAT

10:08AM 25 OFFER.

10:08AM 1 I'M GOING TO SUGGEST SOMETHING DIFFERENT. THE THOUGHT
10:08AM 2 OCCURS TO ME THAT THE TIME TO SECURE A JURY BEGINNING IN
10:08AM 3 SEPTEMBER FOR THE DURATION THAT YOU'VE INDICATED, I THINK YOU
10:08AM 4 SAID 90 DAYS, 3 MONTHS, PUTS US PERILOUSLY CLOSE TO THE HOLIDAY
10:08AM 5 SEASON. MY SENSE IS THAT THERE WILL BE PROBABLY SOME
10:08AM 6 DIFFICULTY TO SECURE JURORS WHO WOULD HAVE TIME AND BE CONFLICT
10:08AM 7 FREE AS WE APPROACH THAT HOLIDAY SEASON. I THINK THAT'S
10:09AM 8 PERHAPS NOT A GOOD PATH TO TAKE.
10:09AM 9 I'M GOING TO SUGGEST SOMETHING ELSE. I UNDERSTAND THAT
10:09AM 10 YOU NEED SOME TIME TO ACCOMPLISH THIS, WHAT YOU NEED TO DO.
10:09AM 11 MY THOUGHT WAS THAT WE, AND LET ME START WITH THE
10:09AM 12 AMBITIOUS DATE, PERHAPS WE COULD, PERHAPS WE COULD ENGAGE JURY
10:09AM 13 SELECTION SOME TIME THE END OF JUNE AND TAKE A BREAK AFTER WE
10:09AM 14 DO THAT. THAT MIGHT TAKE A COUPLE OF DAYS. WE CAN BEGIN THE
10:09AM 15 TRIAL SOME TIME, THAT IS, EVIDENCE BEGINS SOME TIME IN JULY.
10:09AM 16 FOR EXAMPLE, WE COULD BEGIN THE TRIAL SOME TIME ON JULY 7TH,
10:09AM 17 JULY 14TH, AND GO FORWARD.
10:09AM 18 RESTRAIN YOUR ENTHUSIASM, PLEASE.
10:10AM 19 (LAUGHTER.)
10:10AM 20 THE COURT: LET ME ALSO SUGGEST THEN, GOING FORWARD,
10:10AM 21 WE COULD LOOK -- I'M ALSO LOOKING AT PERHAPS JULY 14TH FOR JURY
10:10AM 22 SELECTION, THE WEEK OF JULY 14TH FOR JURY SELECTION.
10:10AM 23 WE COULD TAKE THE FOLLOWING WEEK OFF, WHICH IS THE 20TH,
10:10AM 24 AND THEN PERHAPS ENGAGE EVIDENCE ON THE 28TH, 29TH, THAT WEEK.
10:10AM 25 IF THAT DOESN'T WORK, I'M GIVING YOU SO MANY OUTS HERE, WE

10:10AM 1 COULD -- I THINK THE 28TH WE COULD, AS I SAID, BEGIN JURY
10:10AM 2 SELECTION AND THEN START EVIDENCE ON THE 4TH OF AUGUST. I
10:10AM 3 THINK THAT'S -- THAT'S BASICALLY THAT LATTER IS PUSHING IT --
10:10AM 4 ADVANCING US ABOUT A MONTH, BUT I AM -- I DO HAVE SOME CONCERN
10:10AM 5 ABOUT GOING INTO THE HOLIDAY SEASON. PERHAPS YOU HAVE HOLIDAY
10:10AM 6 PLANS AS WELL.

10:11AM 7 MR. SCHENK: YOUR HONOR, FROM THE GOVERNMENT'S
10:11AM 8 PERSPECTIVE THE GOVERNMENT IS PREPARED TO TRY THE CASE AT THE
10:11AM 9 CONVENIENCE OF THE COURT.

10:11AM 10 WHEN WE WERE LAST BEFORE YOUR HONOR IN APRIL, THE
10:11AM 11 GOVERNMENT ASKED THE COURT TO SET THE MATTER FOR TRIAL THEN
10:11AM 12 RECOGNIZING THAT DISCOVERY WAS VOLUMINOUS AND THE DEFENSE WOULD
10:11AM 13 NEED A SIGNIFICANT AMOUNT OF TIME TO PREPARE.

10:11AM 14 WE ASKED THE COURT TO SET A TRIAL DATE EVEN A YEAR FROM
10:11AM 15 THAT. SO AT THAT TIME WE PROPOSED ROUGHLY APRIL OF 2020.

10:11AM 16 SINCE THEN WE HAD A MEET AND CONFER WITH THE DEFENSE AND
10:11AM 17 IN PARTICULAR COUNSEL FOR MS. HOLMES DESCRIBED TO US THE AMOUNT
10:11AM 18 OF WORK THAT THEY HAD LEFT TO DO TO PREPARE FOR TRIAL, AND IT
10:11AM 19 WAS KIND OF WITH THAT UNDERSTANDING THAT IN ORDER TO PREPARE
10:11AM 20 THEY FELT APRIL WAS REALLY TOO SOON.

10:11AM 21 SO I THINK THE COURT HAS GIVEN US ALL FINE SUGGESTIONS
10:11AM 22 FROM THE GOVERNMENT'S PERSPECTIVE, AND WE WOULD LEAVE IT UP TO
10:11AM 23 THE DEFENSE TO HEAR IF ONE OF THOSE DATES IS A POINT AT WHICH
10:11AM 24 THEY WOULD BE PREPARED TO BEGIN THE TRIAL.

10:11AM 25 BUT FROM THE GOVERNMENT'S PERSPECTIVE WE THINK THAT WE

10:11AM 1 WILL BE ABLE TO BEGIN AT ANY OF THOSE DATES.

10:12AM 2 I WOULD ALSO ASK, THOUGH, THAT -- AND I'M SURE THIS IS

10:12AM 3 WHAT THE COURT MEANT -- THAT THIS IS A FIRM TRIAL DATE. WE'RE

10:12AM 4 NOT GOING TO BE COMING BACK BEFORE YOUR HONOR IN APRIL OF 2020

10:12AM 5 AND SAYING WE NOW NEED SOME ADDITIONAL TIME. WE'RE GOING TO

10:12AM 6 HAVE SIGNIFICANT SUBPOENAS TO SERVE IN THE CASE, MANY CIVILIAN

10:12AM 7 WITNESSES, AND THERE'S REAL VALUE TO HAVING FIRM TRIAL DATES.

10:12AM 8 SO WHEN WE ASK WITNESSES TO CLEAR THEIR SCHEDULES AND TO BE

10:12AM 9 AVAILABLE FOR COURT, THAT IS A ONE-TIME REQUEST AND WE CAN SAY

10:12AM 10 IT WITH SOME LEVEL OF CERTAINTY, AND I APPRECIATE I'M SURE

10:12AM 11 THAT'S WHAT THE COURT MEANT WHEN IT WAS OFFERING THESE DATES.

10:12AM 12 THE COURT: WELL, THANK YOU, MS. SCHENK. THAT IS

10:12AM 13 WHAT I MEAN. YOU'RE ASKING ME TO SET ASIDE THREE MONTHS OF

10:12AM 14 COURT TIME FOR THIS CASE, AND BOTH SIDES ARE ENTITLED TO THAT.

10:12AM 15 I'LL DO THAT. I'LL DO THAT.

10:12AM 16 OF COURSE, YOU KNOW THE BUSINESS OF FEDERAL COURTS. I

10:12AM 17 NEED TO DISAPPOINT OTHER COURT USERS FOR THAT TIME PERIOD. SO

10:12AM 18 I DO WANT TO SECURE FIRM TRIAL DATES THAT GIVES EVERYONE HERE A

10:13AM 19 FIRM EVENT HORIZON TO FOCUS ON SUCH THAT THERE WON'T BE ANY

10:13AM 20 CHANGES TO THAT.

10:13AM 21 COUNSEL.

10:13AM 22 MR. DOWNEY: YOUR HONOR, I WOULD SAY WE SHARE -- WE

10:13AM 23 UNDERSTAND THE SITUATION, WE UNDERSTAND THE NEED TO SET A DATE

10:13AM 24 GIVEN THE LENGTH OF THE TRIAL.

10:13AM 25 I WOULD SAY OF THE DATES THAT YOU HAVE SUGGESTED, WE WOULD

10:13AM 1 SUGGEST COMMENCING WITH SELECTION ON THE 28TH OF JULY.

10:13AM 2 THE COURT: EXPERIENCED DEFENSE COUNSEL ALWAYS LOOKS

10:13AM 3 TO THE LATTER DATE. NO CRITICISM INVOLVED.

10:13AM 4 WHEN I WAS PRACTICING, THAT WAS SOMETHING THAT I

10:13AM 5 OCCASIONALLY DID AS WELL.

10:13AM 6 MR. DOWNEY: NO, I UNDERSTAND. AND I ONLY WANT TO

10:13AM 7 SAY, BECAUSE THESE ISSUES ARE NOT BEFORE THE COURT TODAY, OUR

10:13AM 8 CONCERN IS NOT REALLY ABOUT THE DATE AS AN ABSTRACTION.

10:13AM 9 OUR CONCERN IS THAT THERE ARE ANY NUMBER OF ISSUES IN

10:13AM 10 TERMS OF THE GOVERNMENT'S RULE 26 COMPLIANCE THAT ARE STILL

10:13AM 11 OUTSTANDING.

10:13AM 12 WE ARE CONTINUING TO GET LARGE VOLUMES OF MATERIAL FROM

10:14AM 13 THE GOVERNMENT SO I THINK --

10:14AM 14 THE COURT: WELL, THAT'S THE PROVERB, YOU ASK AND

10:14AM 15 YOU SHALL RECEIVE. IT'S NOT A PROVERB BUT SOMEONE SAID THAT

10:14AM 16 ONCE. SO, YOU KNOW, YOU ASK FOR IT, YOU GET IT, AND THEN OF

10:14AM 17 COURSE YOU HAVE TO DIGEST IT. SO I APPRECIATE THAT. THERE'S

10:14AM 18 VOLUMINOUS DISCOVERY HERE.

10:14AM 19 I THINK IF WE SET, AND THAT WAS MY THOUGHT, AND I'M SORRY

10:14AM 20 TO INTERRUPT YOU, BUT MY THOUGHT WAS THE FIRST THING WE DO IS

10:14AM 21 LET'S SET A TRIAL DATE THAT WE CAN ALL FOCUS ON AND THEN YOU

10:14AM 22 CAN ADJUST YOUR WORK SCHEDULES ACCORDINGLY, THE PRODUCTION, AND

10:14AM 23 I'M GOING TO TALK ABOUT THAT IN A MOMENT.

10:14AM 24 JUST TO ADVANCE THAT CONVERSATION, I'LL PROBABLY BE

10:14AM 25 TELLING THE GOVERNMENT, YOU NEED TO TELL THESE FOLKS TO RAMP IT

10:14AM 1 UP BECAUSE WE NOW HAVE A TRIAL DATE.

10:14AM 2 MR. DOWNEY: YEAH. AND I EXPECT, YOUR HONOR, THAT

10:14AM 3 WE'LL BE ABLE TO WORK WITH THE GOVERNMENT AND EITHER AGREE ON

10:14AM 4 OR COME CLOSE TO AGREEING ON A PROPOSED SCHEDULE THAT CONFORMS

10:14AM 5 WITH THE TRIAL DATE.

10:14AM 6 AND I WOULD SAY WE'LL LIKELY BE ASKING THE COURT TO BE

10:14AM 7 ATTENTIVE TO THAT RULE 16 CUTOFF.

10:14AM 8 THE COURT: SURE. OKAY.

10:14AM 9 MR. DOWNEY: THANK YOU, YOUR HONOR.

10:15AM 10 THE COURT: LET ME ASK YOUR COLLEAGUES.

10:15AM 11 MR. CAZARES: YOUR HONOR, MR. BALWANI AGREES WITH

10:15AM 12 MR. DOWNEY THAT AUGUST IS LIKELY BETTER, LESS FOR OUR SCHEDULE,

10:15AM 13 BUT ALSO I'VE TRIED CASES IN THE SUMMER TIME AND JURORS ALSO

10:15AM 14 HAVE VACATION PLANS. JULY TENDS TO BE VERY DIFFICULT TO SECURE

10:15AM 15 A LONG-TERM VOIR DIRE IN FEDERAL COURT.

10:15AM 16 SO I WOULD CONCUR THAT AUGUST MAKES SENSE. IF WE START ON

10:15AM 17 THE 28TH, THAT WOULD AT LEAST AVOID SOME OF THE JUROR VACATION

10:15AM 18 ISSUES THAT OFTEN COME UP.

10:15AM 19 THE COURT: I'M SORRY. WHEN YOU SAY, "START," ARE

10:15AM 20 YOU SUGGESTING START EVIDENCE OR START THE JURY SELECTION?

10:15AM 21 MR. CAZARES: I THINK TO THE EXTENT THAT WE START

10:15AM 22 THE JURY SELECTION AT THE END OF JULY, I DON'T THINK -- I THINK

10:15AM 23 THAT WOULD LIKELY AVOID MOST JUROR VACATION ISSUES. I THINK

10:15AM 24 THAT'S THE GOAL IN SOME WAYS, TRY TO AVOID THEIR HOLIDAY

10:15AM 25 VACATIONS AND TRY TO AVOID MAYBE SOME OF THEIR SUMMER VACATIONS

10:15AM 1 AND PLANT THE TRIAL SOMEWHERE RIGHT IN BETWEEN.

10:15AM 2 THE COURT: MS. SCHENK?

10:15AM 3 MR. SCHENK: THAT IS FINE WITH THE GOVERNMENT. AS I

10:15AM 4 UNDERSTAND IT JULY 28TH IS JURY SELECTION?

10:15AM 5 THE COURT: RIGHT, THAT IS THE DATE THAT I WAS

10:16AM 6 PROPOSING JULY 28TH. MY SENSE IS THAT WE'LL PROBABLY BLEED

10:16AM 7 INTO THE 29TH.

10:16AM 8 BUT WE'LL DO JURY SELECTION THAT WEEK. THERE WON'T BE ANY

10:16AM 9 RECEIPT OF EVIDENCE OR OPENING STATEMENTS UNTIL THE FOLLOWING

10:16AM 10 WEEK.

10:16AM 11 EVIDENCE AND OPENING STATEMENTS WILL BEGIN AUGUST 4TH,

10:16AM 12 AUGUST 4TH.

10:16AM 13 IS THAT AGREEABLE?

10:16AM 14 MR. SCHENK: YES.

10:16AM 15 MR. DOWNEY: YES, YOUR HONOR.

10:16AM 16 MR. CAZARES: YES, YOUR HONOR.

10:16AM 17 THE COURT: ALL RIGHT. THANK YOU. THEN WE'VE GOT

10:16AM 18 OUR TRIAL DATE SET.

10:16AM 19 I WON'T SET A PRETRIAL CONFERENCE DATE YET. WHAT I'D LIKE

10:16AM 20 TO DO IS HAVE OUR CONVERSATION ABOUT DISCOVERY, AND THEN IF I

10:16AM 21 SET AN INTERIM STATUS DATE, AT WHICH POINT I'LL THEN SET AN

10:16AM 22 INTERIM STATUS CONFERENCE DATE DEPENDING ON THE DISCOVERY AS

10:16AM 23 YOU SUGGESTED.

10:16AM 24 OKAY. MADAM CLERK, LET'S RESERVE THAT TIME FOR TRIAL IN

10:16AM 25 THIS MATTER. I THINK COUNSEL SAID THREE MONTHS?

10:16AM 1 MR. SCHENK: YES, YOUR HONOR.

10:16AM 2 MR. DOWNEY: YOUR HONOR, WE, WE -- THAT'S OUR BEST

10:16AM 3 ESTIMATE. OBVIOUSLY WE'RE LARGELY DEPENDENT ON THE LENGTH OF

10:17AM 4 THE GOVERNMENT'S PRESENTATION WHICH WE DON'T YET KNOW, BUT

10:17AM 5 BASED ON WHAT THEY'VE REPRESENTED TO US, IT SOUNDS LIKE A GOOD

10:17AM 6 ESTIMATE.

10:17AM 7 THE COURT: OKAY.

10:17AM 8 MR. CAZARES: YES, YOUR HONOR.

10:17AM 9 THE COURT: OKAY. WE'LL DO THAT.

10:17AM 10 MADAM CLERK, AUGUST, SEPTEMBER, AND OCTOBER.

10:17AM 11 THE CLERK: YES, YOUR HONOR.

10:17AM 12 THE COURT: WE'LL SET, AS I SAID, A PRETRIAL

10:17AM 13 CONFERENCE DATE. WE'LL ADJUST THE DATES PROPER. I THINK YOU

10:17AM 14 PROBABLY HAVE OR MAY HAVE SOME FAMILIARITY. WE TYPICALLY GO

10:17AM 15 THREE DAYS A WEEK FOR TRIAL, SOMETIMES MORE, SOMETIMES LESS,

10:17AM 16 BUT WE CAN ADJUST THAT SCHEDULE AS WE GO FORWARD.

10:17AM 17 ALL RIGHT. THANK YOU. ANYTHING FURTHER ON THE TRIAL DATE

10:17AM 18 THEN?

10:17AM 19 MR. SCHENK: NO, YOUR HONOR.

10:17AM 20 MR. DOWNEY: NO, YOUR HONOR.

10:17AM 21 MR. CAZARES: NO, YOUR HONOR.

10:17AM 22 THE COURT: ALL RIGHT. THANK YOU. LET'S LOOK THEN

10:17AM 23 TO THE MOTION THAT IS BEFORE US. NOW, WHY DON'T I HEAR -- CAN

10:17AM 24 I GET AN UPDATE ON THE STATUS OF DISCOVERY?

10:17AM 25 MR. BOSTIC, DO YOU WANT TO SPEAK TO THAT?

10:17AM 1 MR. BOSTIC: YES, YOUR HONOR.

10:17AM 2 THE COURT: AND I REALIZE THIS IS THE DEFENSE

10:17AM 3 MOTION, BUT I WANTED TO GET AN UPDATE FROM THE GOVERNMENT IF

10:18AM 4 YOU DON'T MIND.

10:18AM 5 MR. BOSTIC: I'LL COME UP TO THE PODIUM SO I CAN

10:18AM 6 LOOK AT MY NOTES. LARGELY THE CURRENT STATUS OF DISCOVERY IN

10:18AM 7 THIS MATTER AS TO THE AGENCY'S FDA AND CMS, THAT STATUS IS

10:18AM 8 REFLECTED IN THE GOVERNMENT'S OPPOSITION.

10:18AM 9 AS TO LARGER DISCOVERY IN THE CASE, I UNDERSTAND THE

10:18AM 10 COURT'S QUESTION IS ABOUT DISCOVERY GENERALLY.

10:18AM 11 AS I'VE PREVIOUSLY TOLD THE COURT, DISCOVERY IN THIS CASE

10:18AM 12 IS SUBSTANTIALLY COMPLETE. THE VAST MAJORITY OF THE

10:18AM 13 GOVERNMENT'S PRODUCTION HAS BEEN SENT OVER TO THE DEFENSE.

10:18AM 14 THERE ARE STILL SOME OUTSTANDING LARGE BATCHES OF

10:18AM 15 DISCOVERY THAT ARE STILL ON THEIR WAY OVER. WE'RE MAKING EVERY

10:18AM 16 EFFORT TO GET THOSE TO THE DEFENSE AS SOON AS POSSIBLE.

10:18AM 17 THE TWO SIGNIFICANT BATCHES OF DISCOVERY THAT ARE STILL

10:18AM 18 OUTSTANDING OR WERE RECENTLY OUTSTANDING, ONE WAS A PORTION OF

10:18AM 19 A BATCH OF ABOUT 250,000 DOCUMENTS PRODUCED BY THERANOS SHORTLY

10:18AM 20 BEFORE IT CEASED OPERATIONS.

10:18AM 21 THE GOVERNMENT HAS BEEN UNDERGOING A FILTER TEAM OR TAIN

10:19AM 22 REVIEW OF THOSE DOCUMENTS, AND WE'VE PRODUCED HALF OF THOSE

10:19AM 23 DOCUMENTS A FEW WEEKS AGO TO THE DEFENSE AND MORE RECENTLY

10:19AM 24 WE'VE PRODUCED THE OTHER HALF SO THE DEFENSE NOW HAS ALL OF

10:19AM 25 THOSE MATERIALS.

10:19AM 1 I SHOULD NOTE THAT THE SECOND HALF THAT WE PRODUCED THE
10:19AM 2 GOVERNMENT HAS NOT COMPLETED ITS FILTER REVIEW YET SO THE TRIAL
10:19AM 3 TEAM DOES NOT HAVE ACCESS TO ANY OF THESE DOCUMENTS YET, BUT
10:19AM 4 WE'VE PROVIDED THEM TO THE DEFENSE IN THE INTEREST OF
10:19AM 5 EFFICIENCY AND SO THAT THEY CAN BEGIN REVIEWING IN TRIAL
10:19AM 6 PREPARATION.

10:19AM 7 THE OTHER OUTSTANDING LARGE BATCH OF DISCOVERY IS
10:19AM 8 SOMETHING THAT HAS RECENTLY COME INTO THE GOVERNMENT'S
10:19AM 9 POSSESSION. IT'S A LARGE HARD DRIVE. I UNDERSTAND THAT A LOT
10:19AM 10 OF THE CONTENT WILL CONSIST OF VIDEO FILES, MARKETING MATERIALS
10:19AM 11 MADE BY OR AT THE DIRECTION OF THERANOS. WE ARE PREPARING TO
10:19AM 12 PRODUCE THAT TO THE DEFENSE AS WELL. THE ONLY HOLDUP THERE IS
10:19AM 13 OBTAINING THE HARDWARE NECESSARY TO LOAD IT AND ACTUALLY
10:19AM 14 PROVIDE IT TO THE DEFENSE.

10:19AM 15 SO THERE AGAIN OUR PLAN IS TO GIVE IT TO THE DEFENSE
10:19AM 16 BEFORE WE'VE HAD A CHANCE TO REVIEW IT TO MAKE SURE THAT THEY
10:20AM 17 HAVE IT AS SOON AS POSSIBLE.

10:20AM 18 THE COURT: AND IS THIS COPY, IS THAT GOING TO BE
10:20AM 19 JUST A COPY, IF YOU WILL, AS OPPOSED TO GOING THROUGH ANY
10:20AM 20 PROPRIETARY SOFTWARE THAT THE GOVERNMENT USES TO DOWNLOAD OR
10:20AM 21 DISCOVERY?

10:20AM 22 I ASK THAT QUESTION BECAUSE YOU KNOW THERE ARE SOMETIMES
10:20AM 23 ISSUES ABOUT, WELL, YOU KNOW, THE GOVERNMENT PROTOCOL IS
10:20AM 24 DIFFERENT THAN WHAT A DEFENDANT MIGHT HAVE.

10:20AM 25 MR. BOSTIC: CORRECT, YOUR HONOR. SO IN THIS CASE

10:20AM 1 THE FILES THEMSELVES CAME FROM A THIRD PARTY SO THEY'RE IN
10:20AM 2 WHATEVER FORMAT THAT THIRD PARTY USED. I DON'T KNOW STANDING
10:20AM 3 HERE TODAY WHAT FORMAT THAT IS.
10:20AM 4 WE'LL LOOK AT IT WHEN WE GET IT AND MAKE A DETERMINATION
10:20AM 5 AS TO WHETHER IT'S MORE EFFICIENT FOR THE GOVERNMENT TO PROCESS
10:20AM 6 IT AND PRODUCE IT TO THE DEFENSE WITH METADATA AS WE WOULD WITH
10:20AM 7 OTHER PRODUCTION OR TO SIMPLY COPY THE DATA AND GIVE IT TO
10:20AM 8 THEM IN THE SAME FORM THAT WE HAVE, AND WE WILL ALSO CONFIRM
10:20AM 9 WITH THEM TO DETERMINE THEIR PREFERENCES.
10:20AM 10 THE COURT: OKAY. THANK YOU FOR THE UPDATE.
10:20AM 11 WHAT SHOULD I KNOW FROM THE DEFENSE ABOUT YOUR MOTION?
10:20AM 12 MR. WADE: WELL, YOUR HONOR, GIVEN THAT THE COURT
10:21AM 13 HAS MADE A DECISION TO EXPEDITE OUR JOINT RECOMMENDATION TO
10:21AM 14 TRIAL, MAYBE THEN AN ORDER IS NEEDED TO TRY TO MOVE THINGS
10:21AM 15 ALONG AND TO HELP THE GOVERNMENT IN OBTAINING THE AGENCY
10:21AM 16 MATERIALS THAT WE NEED.
10:21AM 17 THE DOCUMENTS THAT WE'RE SEEKING ARE AT THE CORE OF THE
10:21AM 18 CASE. THE -- AND THEY'RE NECESSARY FOR OUR PREPARATION FOR
10:21AM 19 TRIAL.
10:21AM 20 A SIGNIFICANT ALLEGATION IN THE INDICTMENT IS THE
10:21AM 21 GOVERNMENT'S ALLEGATION THAT THERANOS'S TESTS WERE UNRELIABLE
10:21AM 22 AND INACCURATE.
10:21AM 23 THE GOVERNMENT APPEARS TO WANT TO BUILD ITS CASE ON
10:21AM 24 INFORMATION THAT IT RECEIVED FROM CMS AND FROM CMS WITNESSES.
10:21AM 25 THEY'VE SOUGHT TESTIMONY FROM THREE WITNESSES, AND THEY

10:21AM 1 RECEIVED HUNDREDS OF THOUSANDS OF PAGES OF DOCUMENTS AND
10:21AM 2 TERABYTES OF DATA.

10:21AM 3 ANOTHER CENTRAL ALLEGATION IN THE CASE RELATES TO ALLEGED
10:21AM 4 MISREPRESENTATIONS BY MS. HOLMES AND MR. BALWANI REGARDING THE
10:22AM 5 NEED FOR FDA APPROVAL OF THERANOS TECHNOLOGY.

10:22AM 6 HERE AGAIN THE GOVERNMENT APPEARS POISED TO BUILD ITS CASE
10:22AM 7 ON INFORMATION AND TESTIMONY IT OBTAINED FROM THE FDA.

10:22AM 8 THE GOVERNMENT BY ALL ACCOUNTS HAD NEARLY UNFETTERED
10:22AM 9 ACCESS TO THOSE AGENCIES. THEY OBTAINED INFORMATION WITHOUT A
10:22AM 10 SUBPOENA, SEEMINGLY AT WILL.

10:22AM 11 THERE'S NO INDICATION IN THE RECORD THAT IS BEFORE THE
10:22AM 12 COURT THAT THERE WAS EVER ANY RESISTANCE TO ANY REQUEST MADE BY
10:22AM 13 THE GOVERNMENT AND THAT RESISTANCE DIDN'T MANIFEST ITSELF UNTIL
10:22AM 14 DEFENSE REQUEST FOR INFORMATION THAT THE GOVERNMENT DID NOT
10:22AM 15 GATHER WERE PASSED THROUGH.

10:22AM 16 THEN SUDDENLY THE REGULATORY HAZE SORT OF APPEARS IN FRONT
10:22AM 17 OF ALL OF THESE REQUESTS AND THE OBSTACLES ARE PRESENTED AND
10:23AM 18 DELAY RESULTS.

10:23AM 19 AS THE COURT KNOWS, BECAUSE YOU NOTED AT THE START OF THE
10:23AM 20 HEARING, THE MOUNTAIN OF PAPER THAT YOU'VE REVIEWED IN ADVANCE
10:23AM 21 OF THIS HEARING. FRANKLY, WE ARE SURPRISED YOU DIDN'T WANT THE
10:23AM 22 WEEKEND TO REVIEW IT AND WANTED TO ADVANCE THE HEARING.

10:23AM 23 BUT AS YOU KNOW FROM THAT, THERE HAVE BEEN SUBSTANTIAL
10:23AM 24 DELAYS IN OUR ABILITY TO ACCESS THAT MATERIAL. MR. BALWANI'S
10:23AM 25 PLEADING SETS FORTH TEN MONTHS OF EFFORTS TO TRY AND GET THAT

10:23AM 1 MATERIAL IN THE RELATED PROCEEDING.

10:23AM 2 WE'RE NOT A PARTY TO THE S.E.C. PROCEEDING. WE'VE BEEN

10:23AM 3 TRYING TO GET IT FOR SIX MONTHS.

10:23AM 4 THE GOVERNMENT, THANKFULLY RECENTLY, ON THE EVE OF OUR

10:23AM 5 INDICATION THAT WE WERE GOING TO FILE A MOTION RELAYED THESE

10:23AM 6 REQUESTS TO CMS AND THE FDA AND AS VOLUNTARILY REQUESTS.

10:23AM 7 THE LAW REQUIRES MORE. THIS IS AN OBLIGATION. SANTIAGO

10:23AM 8 AND BRYAN ARE CLEAR. THE NINTH CIRCUIT LAW IS CLEAR. WHEN THE

10:23AM 9 GOVERNMENT IS ABLE TO GO IN AND GET ACCESS TO AGENCY DOCUMENTS

10:24AM 10 IN THIS WAY, THEY'RE WITHIN THE CUSTODY, POSSESSION, AND

10:24AM 11 CONTROL OF THE PROSECUTION TEAM, AND THEY HAVE TO GET MATERIALS

10:24AM 12 THAT ARE NECESSARY TO THE PREPARATION OF THE DEFENSE AND BRADY

10:24AM 13 MATERIAL. THE LAW IS UNAMBIGUOUS IN THAT REGARD.

10:24AM 14 SO WE APPRECIATE THE GOOD FAITH EFFORTS OF THE GOVERNMENT

10:24AM 15 TO RECOGNIZE THE VALIDITY OF OUR SIX REQUESTS.

10:24AM 16 THE COURT: AND THOSE SIX REQUESTS, I THINK, WERE

10:24AM 17 ADVANCED TO THE AGENCIES?

10:24AM 18 MR. BOSTIC: CORRECT, YOUR HONOR.

10:24AM 19 THE COURT: VERBATIM REQUESTS AS I UNDERSTAND IT.

10:24AM 20 MR. BOSTIC: THAT'S CORRECT, YOUR HONOR.

10:24AM 21 MR. WADE: THEY WERE, AND WE APPRECIATE THAT. AND

10:24AM 22 WE ALSO APPRECIATE THAT THE GOVERNMENT MAY NOT BE RECEIVING AS

10:24AM 23 GOOD A CUSTOMER SERVICE WITH RESPECT TO THE DEFENSE REQUEST AS

10:24AM 24 THEY RECEIVED WITH RESPECT TO THEIR OWN.

10:24AM 25 THAT'S WHY A COURT ORDER IS NEEDED HERE TO PROMPT THE

10:24AM 1 AGENCIES TO MEET THE OBLIGATIONS AND LET THE GOVERNMENT SATISFY
10:24AM 2 THEIR RULE 16 REQUIREMENTS.

10:24AM 3 THE COURT: SO LET ME ASK -- PARDON ME FOR
10:25AM 4 INTERRUPTING YOU. BUT LET ME ASK, I'M CURIOUS ABOUT A COUPLE
10:25AM 5 OF THINGS.

10:25AM 6 FIRST OF ALL, PARALLEL PROCEEDINGS HERE, WE KNOW THAT,
10:25AM 7 MR. BALWANI'S S.E.C. PROCEEDING, AND I THINK SOME OF THE
10:25AM 8 RESPONSES FROM THE AGENCIES SEEM TO SUGGEST, AND I'M GETTING A
10:25AM 9 LITTLE AHEAD HERE, SEEM TO SUGGEST THAT IN RESPONSE TO
10:25AM 10 MS. HOLMES'S REQUEST, I ALMOST READ IT, MR. BOSTIC, YOU CAN
10:25AM 11 HELP ME ON THIS, I ALMOST READ THE RESPONSE, I THINK IT'S A
10:25AM 12 JUNE 10TH AND A JUNE 7 LETTER FROM FDA AND CMS RESPECTIVELY,
10:25AM 13 THEY ALSO SEEM TO SAY THAT WE'RE GOING TO PROVIDE MR. BALWANI
10:25AM 14 INFORMATION PURSUANT TO HIS CIVIL S.E.C. RESPONSES.

10:25AM 15 AND THE RESPONSE TO MS. HOLMES'S REQUEST ALMOST SEEMS TO
10:25AM 16 SAY SEE BALWANI. MY SENSE IS YOU HAVE SOME OBJECTION TO THAT
10:26AM 17 BECAUSE YOU TOLD ME IN YOUR PLEADINGS YOU'RE NOT A PARTY TO
10:26AM 18 THAT AND YOU WOULD LIKE SOME ANSWERS SPECIFICALLY TO YOUR
10:26AM 19 REQUEST.

10:26AM 20 MR. WADE: OUR POSITION IS SIMPLE. IF YOU BACK UP A
10:26AM 21 STEP, YOUR HONOR, AT THE START OF THE INVESTIGATION THE
10:26AM 22 GOVERNMENT SENT A PRESERVATION NOTICE TO THESE TWO AGENCIES AND
10:26AM 23 SAID PRESERVE EVERYTHING --

10:26AM 24 THE COURT: NO, I UNDERSTAND.

10:26AM 25 MR. WADE: -- RELATING TO THERANOS.

10:26AM 1 IF IT'S EASIER TO GIVE US EVERYTHING RELATING TO THERANOS

10:26AM 2 AND AVOID ALL OF THE REVIEW THAT THEY COMPLAIN ABOUT, WE'RE

10:26AM 3 HAPPY TO TAKE THAT AND DO THE WORK.

10:26AM 4 BUT NOW THEIR POSITION -- THE POSITIONS OF THE FDA AND CMS

10:26AM 5 DIFFER SOMEWHAT, BUT THEY DON'T TAKE OUR REQUEST AND SAY WE'LL

10:26AM 6 COMPLY WITH THEM. THEY TAKE OUR REQUESTS AND SAY WE'LL DO

10:26AM 7 EFFORTS THAT WE CONSIDER TO BE REASONABLE. WE'LL DECIDE WHAT

10:26AM 8 WE THINK IS RELEVANT, AND WE WILL RESPOND TO THOSE REQUESTS

10:26AM 9 ACCORDINGLY.

10:26AM 10 IN FACT, IF YOU LOOK AT THE FDA REQUEST, IT MAKES -- THE

10:26AM 11 FDA LETTER OF JUNE 7TH, IT MAKES CLEAR THAT IT DOESN'T THINK

10:26AM 12 THAT MUCH OF WHAT WE SEEK IS RELEVANT, IT'S NOT CLEAR WHAT

10:27AM 13 THEY'RE GATHERING, IT'S NOT CLEAR WHICH CUSTODIANS THEY'RE

10:27AM 14 LOOKING AT.

10:27AM 15 FRANKLY, IT'S NOT CLEAR THAT THEY'RE EVEN GOING TO RESPOND

10:27AM 16 TO MANY OF OUR REQUESTS.

10:27AM 17 THE COURT: WELL, LET'S START WITH THE FDA. THEY

10:27AM 18 TALK ABOUT THAT THEY NEED EITHER A WAIVER OR A PROTECTIVE ORDER

10:27AM 19 OR BOTH FROM THERANOS, THE ASSIGNEE OF THERANOS.

10:27AM 20 WHAT IS THE LATEST ON THAT?

10:27AM 21 MR. BOSTIC: SO, YOUR HONOR, NOT TO INTERRUPT.

10:27AM 22 THE COURT: YES. NO, PLEASE.

10:27AM 23 MR. BOSTIC: MY UNDERSTANDING OF THE STATUS THERE IS

10:27AM 24 THAT MR. BALWANI'S COUNSEL HAS BEEN ABLE TO OBTAIN A WAIVER

10:27AM 25 THAT PERMITS THE AGENCY TO PRODUCE IN THE CIVIL CASE.

10:27AM 1 I HAVE NOT HEARD THAT MR. BALWANI'S COUNSEL HAS BEEN ABLE
10:27AM 2 TO OBTAIN THAT WAIVER APPLYING TO THE CRIMINAL CASE. I WOULD
10:27AM 3 IMAGINE THAT IT MIGHT BE THE SAME ANALYSIS FOR THE ASSIGNEE,
10:27AM 4 BUT I HAVE NOT HAD THOSE CONVERSATIONS WITH THE ASSIGNEE.

10:27AM 5 THE COURT: IT SOUNDS LIKE PER THEIR LETTER THAT
10:27AM 6 MIGHT BE HELPFUL.

10:27AM 7 MR. WADE: YOUR HONOR, THE DEFENSE HAS NO OBLIGATION
10:27AM 8 TO DO ANYTHING FOR THE GOVERNMENT TO MEET ITS RULE 16
10:27AM 9 OBLIGATIONS. THEY HAVE AN OBLIGATION TO MEET THEIR RULE 16
10:28AM 10 OBLIGATIONS. WE WANT TO DO WHATEVER WE CAN TO MEET AND CONFER.

10:28AM 11 THE COURT: HOW CAN I HELP YOU?

10:28AM 12 MR. WADE: AN ORDER FROM THE COURT.

10:28AM 13 THE COURT: CAN I ORDER THEM TO DO A WAIVER?

10:28AM 14 MR. WADE: YOU CAN ORDER THEM TO PRODUCE THE
10:28AM 15 DOCUMENTS.

10:28AM 16 THE COURT: THAT'S NOT MY QUESTION. MY QUESTION WAS
10:28AM 17 IF THEY NEED A WAIVER, LET'S GET THE WAIVER. LET'S JUST GET IT
10:28AM 18 DONE.

10:28AM 19 MR. WADE: THEY WON'T NEED A WAIVER, YOUR HONOR,
10:28AM 20 RESPECTIVELY.

10:28AM 21 MANY OF THE BARRIERS THEY'RE ERECTING ARE BECAUSE THEY
10:28AM 22 DON'T HAVE A COURT ORDER THAT IS REQUIRING THEM. IT'S NOT
10:28AM 23 CLEAR TO US THAT THEY ACTUALLY -- THAT THE BASES THAT THEY'RE
10:28AM 24 PROVIDING ARE A PROPER BASIS TO NOT MEET RULE 16 OBLIGATIONS,
10:28AM 25 WHICH CLEARLY THESE AGENCIES FALL WITHIN RULE 16 GIVEN HOW

10:28AM 1 CENTRAL THEY ARE AND THE ACCESS AND KNOWLEDGE OF THE GOVERNMENT
10:28AM 2 WITH RESPECT TO THIS. BUT IF THE COURT ISSUES AN ORDER THAT --
10:28AM 3 THE COURT: I UNDERSTAND THAT. LET'S PARSE THROUGH
10:28AM 4 THIS THEN, LET'S PARSE THROUGH THIS.
10:28AM 5 MR. WADE: YES.
10:28AM 6 THE COURT: THEY'RE SAYING, THE FDA, -- I'M LOOKING
10:28AM 7 AT THE LETTER, AND THIS IS 79-4, DOCUMENT 79-4, ECF PAGE 4 OF
10:29AM 8 5, THE SECOND PARAGRAPH IN THE MIDDLE, IT TALKS ABOUT -- AND
10:29AM 9 THIS IS A LETTER AUTHORED FROM MARCI, M-A-R-C-I, V. NORTON,
10:29AM 10 N-O-R-T-O-N, SENIOR COUNSEL, AND SHE SAYS IN THE LETTER THAT
10:29AM 11 THE FDA IS PROHIBITED FROM RELEASING TRADE SECRET AND
10:29AM 12 CONFIDENTIAL, COMMERCIAL AND FINANCIAL INFORMATION, CCI,
10:29AM 13 REGARDING DEVICES OBTAINED, ET CETERA, ET CETERA. TRADE
10:29AM 14 SECRETS.
10:29AM 15 SHE SUGGESTS THAT AN ASSIGNEE PROVIDE A WRITTEN WAIVER
10:29AM 16 PERMITTING THEM TO DO THAT.
10:29AM 17 THAT SEEMS PRETTY SIMPLE TO DO. MAYBE I'M MISSING
10:29AM 18 SOMETHING. CAN'T WE GET THAT?
10:29AM 19 MR. WADE: WE HAVE NO ABILITY TO GET THAT, YOUR
10:29AM 20 HONOR.
10:29AM 21 THE COURT: HAVE YOU MADE A REQUEST FOR THAT?
10:29AM 22 MR. WADE: AGAIN, WE HAVE NOT MADE A REQUEST.
10:29AM 23 PREVIOUSLY WHEN THE GOVERNMENT OBTAINED ALL OF THE MATERIALS IT
10:29AM 24 WANTED DURING THE INVESTIGATION, THE GOVERNMENT WENT TO
10:29AM 25 THERANOS AND GOT SUCH A WAIVER, AND IF THE GOVERNMENT FEELS

10:30AM 1 THAT'S THE GATEWAY TO MEETING ITS RULE 16 OBLIGATIONS AND
10:30AM 2 CUTTING THROUGH THIS, IT'S WELCOME TO DO SO.

10:30AM 3 YOUR HONOR, I WOULD RESPECTFULLY SAY AN ORDER FROM THIS
10:30AM 4 COURT THAT REQUIRES THEM TO PRODUCE DOCUMENTS THAT ARE
10:30AM 5 RESPONSIVE TO THESE REQUESTS WOULD OBTAIN THE NEED FOR SUCH A
10:30AM 6 WAIVER FROM THERANOS. WE COULD ALSO AGREE TO A PROTECTIVE
10:30AM 7 ORDER THAT COULD BE IN PLACE IN THIS CASE. I'M SURE WE CAN
10:30AM 8 EASILY MEET AND CONFER WITH THE GOVERNMENT TO FIND SOMETHING.

10:30AM 9 THE COURT: I THOUGHT A PROTECTIVE ORDER WOULD BE IN
10:30AM 10 PLACE SPECIFICALLY IN REGARDS TO CMS. THEY WANT A PROTECTIVE
10:30AM 11 ORDER FOR SOME OF THAT MATERIAL, AND THAT WAS GOING TO BE MY
10:30AM 12 NEXT QUESTION WHETHER OR NOT THERE HAD BEEN A MEET AND CONFER
10:30AM 13 TO ACCOMPLISH THIS.

10:30AM 14 I RECOGNIZE YOU'RE SAYING IT'S BEEN MONTHS, IT'S BEEN SIX
10:30AM 15 MONTHS SINCE WE RECEIVED THIS, BUT I'D LIKE TO HELP YOU OUT AND
10:30AM 16 GET SOME JOINT EFFORT HERE. YOU'RE ALL OF COMMON PURPOSE TO
10:30AM 17 GET THIS DONE.

10:30AM 18 MR. WADE: WE APPRECIATE THAT, YOUR HONOR.

10:30AM 19 THE COURT: LET'S GET IT DONE.

10:30AM 20 MR. WADE: AND WE WOULD LIKE TO GET IT DONE, TOO.

10:31AM 21 AGAIN, TO BE CLEAR, WE THINK THAT THE BEST WAY TO DO THAT
10:31AM 22 IS TO GET AN ORDER FROM THE COURT.

10:31AM 23 RESPECTFULLY, WE'VE DEALT WITH MANY FEDERAL AGENCIES IN
10:31AM 24 OUR PRACTICE. AS YOU KNOW, WE SIT IN OUR NATION'S CAPITOL, AND
10:31AM 25 OBSTACLES REMAIN IF A COURT DOES NOT MAKE CLEAR THAT IT'S A

10:31AM 1 LEGAL OBLIGATION OF THE UNITED STATES GOVERNMENT TO PROVIDE
10:31AM 2 THESE MATERIALS.

10:31AM 3 I WILL REPRESENT TO THE COURT WE WILL MEET AND CONFER
10:31AM 4 DILIGENTLY AND PROVIDE WHATEVER FLEXIBILITY IS WITHIN OUR
10:31AM 5 CONTROL TO GET ACCESS TO THESE DOCUMENTS. PROTECTIVE DOCUMENTS
10:31AM 6 ARE WITHIN OUR CONTROL. WE'RE HAPPY TO PROVIDE A PROTECTIVE
10:31AM 7 ORDER THAT COVERS THE CMS MATERIALS, THE FDA MATERIALS OR ANY
10:31AM 8 OF THE OTHER MATERIALS THAT WE NEED WITHIN RULE 16.

10:31AM 9 BUT THAT DOESN'T RELIEVE THE GOVERNMENT OF ITS OBLIGATION
10:31AM 10 TO GET THE MATERIALS. THE GOVERNMENT RIGHT NOW REFUSES TO
10:31AM 11 ACCEPT THAT OBLIGATION. THEY'VE GOT ALL OF THE MATERIALS THAT
10:31AM 12 THEY WANTED.

10:31AM 13 THE COURT: YOU'RE REFUSING YOUR OBLIGATION, YOUR
10:32AM 14 RULE 16 OBLIGATION?

10:32AM 15 MR. BOSTIC: I WOULD DISAGREE WITH THAT
10:32AM 16 CHARACTERIZATION, YOUR HONOR.

10:32AM 17 MR. WADE: WELL, I THINK THE FACTS HERE SUGGEST
10:32AM 18 OTHERWISE. BRYAN AND -- AGAIN, THE GOVERNMENT IS TRYING TO DO
10:32AM 19 WHAT THE COURT SUGGESTS, WHICH IS THAT THEY ARE TRYING TO DO
10:32AM 20 WHATEVER THEY CAN ON A VOLUNTARY BASIS TO GET THE MATERIAL THAT
10:32AM 21 THEY WANT.

10:32AM 22 WHEN THE GOVERNMENT ON A VOLUNTARY BASIS WENT TO GET
10:32AM 23 INFORMATION, THAT WAS -- THAT IT WANTED FOR ITS INVESTIGATION,
10:32AM 24 THE DOORS WERE WIDE OPEN AND THE SHELVES WERE FULL AND THEY
10:32AM 25 COULD TAKE WHATEVER THEY WANTED.

10:32AM 1 THERE'S NO INDICATION THAT THERE WERE ANY OBSTACLES THAT
10:32AM 2 WERE MEANINGFUL THAT PREVENTED THEM FROM GETTING INFORMATION.
10:32AM 3 THERE SHOULD BE NO REASON THAT THE SAME ISN'T THE -- SAME
10:32AM 4 ISN'T TRUE FOR THESE REQUESTS.
10:32AM 5 THE ONLY REASON THAT THAT IS TRUE IS BECAUSE THESE
10:32AM 6 AGENCIES KNOW THAT THESE ARE DEFENSE REQUESTS. THEY'RE NOT
10:32AM 7 WILLING TO PROVIDE THE SAME LEVEL OF COOPERATION, WHICH IS NOT
10:32AM 8 FAIR, YOUR HONOR.
10:32AM 9 THE COURT: I APPRECIATE THAT. SO ONE THOUGHT I HAD
10:32AM 10 AFTER I READ YOUR INFORMATION AND THE GOVERNMENT'S INFORMATION
10:32AM 11 AND RECOGNIZING THAT MR. BOSTIC AND HIS TEAM HAS PUT FORWARD
10:33AM 12 THESE REQUESTS PURSUANT, VERBATIM TO THE SIX CATEGORIES THAT
10:33AM 13 THE DEFENSE HAS REQUESTED, AND I APPRECIATE THAT. I'M SURE YOU
10:33AM 14 DO, TOO.
10:33AM 15 MR. WADE: WE DO.
10:33AM 16 THE COURT: AND I GUESS THE RESULT IS AT LEAST THE
10:33AM 17 JUNE 7TH, THE JUNE 10TH LETTER FROM THESE TWO AGENCIES.
10:33AM 18 A THOUGHT I HAD ABOUT GOING FORWARD WAS TO GIVE THE
10:33AM 19 GOVERNMENT, YOU, PERHAPS 60, 70 DAYS TO SEE WHAT IS FORTHCOMING
10:33AM 20 AND IF -- AND HAVE ANOTHER STATUS. AND IF THERE'S
10:33AM 21 INSUFFICIENCY, DEFICIENCY OF THE MATERIAL, THEN MAYBE WE SET AN
10:33AM 22 EVIDENTIARY HEARING AND ASK MS. NORTON -- LET'S SEE, WHO IS THE
10:33AM 23 AUTHOR OF THIS CMS LETTER? -- KAREN DYER, D-Y-E-R, TO COME TO
10:33AM 24 COURT AND TELL US WHY THEY HAVEN'T COMPLIED.
10:34AM 25 IT TAKES A LITTLE MORE TIME, AND I REALIZE TIME IS

10:34AM 1 PRECIOUS WHEN YOU'RE PREPARING THE DEFENSE. BUT MY SENSE WAS
10:34AM 2 THAT THERE WAS AN ENGAGEMENT OF AT LEAST A DELIVERY OF THE SIX
10:34AM 3 CATEGORIES. THE FDA, CMS HAVE SAID, OKAY, WE'RE GOING TO START
10:34AM 4 ROLLING THIS OUT. I HAVE SOME QUESTIONS ABOUT -- I THINK FDA
10:34AM 5 SAID IT WILL TAKE US A MONTH TO GET THAT OUT. THE DATE OF
10:34AM 6 THEIR LETTER WAS JUNE 7TH, AND SO WE SHOULD EXPECT DELIVERY IF
10:34AM 7 WE HOLD THEM TO THAT TO JULY 7, NEXT WEEK.
10:34AM 8 BUT I HAD A NOTE TO MYSELF HERE THAT SEEMS TOO LONG. EASY
10:34AM 9 FOR ME TO SAY BECAUSE WE'RE HERE AND WE'RE NOT IN THEIR
10:34AM 10 ARCHIVES. BUT I DO WANT TO ADVANCE THIS, THE DISCOVERY, IN
10:34AM 11 SOME MANNER.
10:34AM 12 THE EASIEST THING I COULD DO TODAY IS TO JUST SIGN A PIECE
10:34AM 13 OF PAPER, SCRATCH SOMETHING OUT AND SAY GIVE IT TO ME. I
10:34AM 14 APPRECIATE THAT.
10:34AM 15 THEY'VE RAISED SOME CONCERNS THAT I THINK HAVE SOME
10:34AM 16 LEGITIMACY. THEY HAVE SOME ATTORNEY-CLIENT PRIVILEGE QUESTIONS
10:34AM 17 ABOUT SOME DOCUMENTS. THEY HAVE SOME OTHER ISSUES ABOUT
10:35AM 18 PRIVILEGED INFORMATION THAT I THINK THEY'RE ENTITLED TO ASSERT
10:35AM 19 AT LEAST A FACIAL OBJECTION TO, AND WE SHOULD HOLD THEM TO THAT
10:35AM 20 AND ALLOW THEM THAT OPPORTUNITY.
10:35AM 21 THEN IF NEEDED, WE CAN COME BACK AND THEY CAN TELL US SO
10:35AM 22 THAT THEY CAN DEVELOP A PRIVILEGE LOG OR WHATEVER THEY NEED TO
10:35AM 23 DO TO SEGREGATE INFORMATION AS TO WHY THEY'RE NOT GIVING IT TO
10:35AM 24 THE DEFENSE. I APPRECIATE THAT.
10:35AM 25 LET ME JUST TELL YOU THAT'S JUST AN OVERALL THOUGHT I HAD

10:35AM 1 TO GIVE THEM THAT TIME TO GET IT DONE. AND MR. BOSTIC AND
10:35AM 2 MR. SCHENK AND MR. LEACH WOULD TELL THEM THAT THE COURT IS
10:35AM 3 ADVISING THEM TO PROCEED WITH AS MUCH SPEED AS THEY CAN GIVE
10:35AM 4 BECAUSE I EXPECT THEM AND I'LL GIVE THEM AN OPPORTUNITY TO
10:35AM 5 VOLUNTARILY TO PRODUCE THE INFORMATION. AND IN THE INTERIM THE
10:35AM 6 COURT IS GOING TO WORK ON AN ORDER THAT WOULD BE FORTHCOMING,
10:35AM 7 AND IT WOULD PROBABLY HAVE A SHORT TIMELINE THEREAFTER IF I'M
10:35AM 8 GOING TO GIVE THEM 60 DAYS. IT WOULD PROBABLY BE A SHORT LEASH
10:36AM 9 AFTER THAT TO COMPLY WITH THE BALANCE OF THINGS. THAT'S AN
10:36AM 10 OVERALL THOUGHT THAT I JUST HAD.
10:36AM 11 MR. WADE: YOUR HONOR, I APPRECIATE THE IMPULSE TO
10:36AM 12 WANT TO GIVE THE AGENCY SOME FLEXIBILITY TO BE COMPLIANT, AND I
10:36AM 13 APPRECIATE -- AND I APPRECIATE THE HESITATION IN WANTING TO
10:36AM 14 JUST IMPOSE AN ORDER ON A CO-EQUAL BRANCH OF GOVERNMENT, I
10:36AM 15 UNDERSTAND THAT.
10:36AM 16 THE COURT: YOU KNOW -- NO, I HAVE NO HESITATION
10:36AM 17 ABOUT THAT.
10:36AM 18 MR. WADE: EVEN BETTER, YOUR HONOR.
10:36AM 19 THE COURT: BUT THERE IS AN ENGAGEMENT GOING ON
10:36AM 20 HERE. THEY SAID THEY WERE GOING TO ROLL SOME THINGS OUT. I
10:36AM 21 UNDERSTAND YOUR POSITION WHEN THEY SAID I THINK IT'S A
10:36AM 22 REASONABLE RESPONSE TO THE REQUEST. I DON'T KNOW WHAT THAT
10:36AM 23 MEANS.
10:36AM 24 I UNDERSTAND YOU SAY, WELL, THIS ISN'T RELEVANT, THIS
10:36AM 25 ISN'T MATERIAL. WELL, THAT'S NOT THEIR CALL, AND THEY DON'T

10:36AM 1 GET TO SAY THAT. I APPRECIATE THAT, AND I'M NOT TAKING THEM AT
10:36AM 2 PERHAPS -- PERHAPS I'M JUST TAKING IT FACIALLY THAT THEY'RE
10:37AM 3 OPINING THAT WE DON'T THINK IT'S RELEVANT. WE DON'T THINK IT'S
10:37AM 4 MATERIAL.

10:37AM 5 THEY DON'T GET TO MAKE THAT CALL. THEY CAN EXPRESS THEIR
10:37AM 6 OPINION ABOUT IT, BUT THEY CAN'T WITHHOLD SOMETHING JUST
10:37AM 7 BECAUSE THEY THINK IT'S NOT HELPFUL. THEY HAVE TO PROVIDE IT,
10:37AM 8 AND THEN WE HAVE A CONVERSATION, AND I THINK THE JUDGE IS THE
10:37AM 9 PERSON THAT GETS TO MAKE THAT CALL LAST TIME I CHECKED SO
10:37AM 10 THAT'S HOW THAT SHOULD PROCEED.

10:37AM 11 THAT'S WHY I'M SAYING THIS PROCESS HAS BEEN ENGAGED NOW,
10:37AM 12 AND I CAN ISSUE AN ORDER TODAY, MR. BOSTIC, BUT I'D LIKE TO
10:37AM 13 GIVE YOU AN OPPORTUNITY TO SHARE MY THOUGHTS WITH THE AGENCIES
10:37AM 14 TO TELL THEM I EXPECT PRODUCTION. THEY'RE ENTITLED TO IT. TO
10:37AM 15 WHATEVER THEY'RE ENTITLED TO, THEY SHOULD GET IT AS SOON AS
10:37AM 16 POSSIBLE.

10:37AM 17 DO WE NEED -- IS THERE ANY OBJECTION TO -- FROM THE
10:37AM 18 PARTIES SPECIFICALLY ABOUT SPECIFIC INFORMATION? I'M TRYING TO
10:37AM 19 PARSE THAT OUT WHAT THEY'RE SAYING.

10:38AM 20 MR. WADE: TO BE HONEST, IT'S A LITTLE OPAQUE HERE,
10:38AM 21 YOUR HONOR.

10:38AM 22 THE COURT: RIGHT. I AGREE. I AGREE.

10:38AM 23 MR. WADE: AND WE RECEIVED THESE LETTERS JUST A
10:38AM 24 SHORT TIME AGO. WE HAVE BEEN MEETING AND CONFERRING ON AN
10:38AM 25 ONGOING BASIS FOR MONTHS. WE RECEIVED THE GOVERNMENT'S

10:38AM 1 POSITION JUST A FEW WEEKS AGO, AND IN RECEIVING THAT IT'S
10:38AM 2 REALLY HARD TO UNDERSTAND EXACTLY WHAT THEY'RE NECESSARILY
10:38AM 3 AGREEING TO DO.

10:38AM 4 A FEW THINGS STAND OUT, YOUR HONOR. IT APPEARS FROM US,
10:38AM 5 BASED ON THE READING OF THE FDA LETTER, THAT THEY'RE ACTUALLY
10:38AM 6 AGREEING TO PRODUCE DOCUMENTS IN RESPONSE TO ONE OF THE
10:38AM 7 REQUESTS, REQUEST 4. THAT'S OBVIOUSLY IN OUR VIEW NOT
10:38AM 8 SUFFICIENT.

10:38AM 9 TO THE EXTENT THAT THEIR POSITION IS ALL OF THE OTHER
10:38AM 10 CATEGORIES ARE IRRELEVANT, WE SHOULD JUST RESOLVE THOSE ISSUES,
10:38AM 11 PROVIDE THE CLARITY THAT IS NEEDED, AND KEEP THIS ON TRACK. WE
10:38AM 12 HAVE THE SAME GOAL, YOUR HONOR. WE WANT TO BE IN A POSITION TO
10:38AM 13 GET THIS INFORMATION AS QUICKLY AS POSSIBLE. THAT'S WHY WE --
10:38AM 14 WHEN WE SAW THE SIGNIFICANCE OF IT, WE RAISED IT PROMPTLY WITH
10:39AM 15 THE COURT IN THE SPRING SO THAT WE COULD GET THIS RESOLVED
10:39AM 16 BECAUSE WE KNOW THIS MAY TAKE SOME TIME, AND OUR HOPE WOULD BE
10:39AM 17 THAT THE DIRECTION FROM THE COURT THAT THESE SIX REQUESTS ARE
10:39AM 18 MATERIAL TO THE PREPARATION OF THE DEFENSE, THAT THAT DIRECTION
10:39AM 19 FROM THE COURT AND THAT ENCOURAGEMENT OF AN EXPEDITIOUS
10:39AM 20 RESPONSE WOULD BE SUFFICIENT.

10:39AM 21 THEIR LETTER SUGGESTS OTHERWISE. AGAIN, NOT -- THROUGH NO
10:39AM 22 FAULT OF THE GOVERNMENT AS REPRESENTED BY THE LAWYERS WHO ARE
10:39AM 23 SITTING IN THIS ROOM WHO RELAYED THOSE SIX REQUESTS FAITHFULLY
10:39AM 24 THROUGH TO THE AGENCIES.

10:39AM 25 THE AGENCIES HAVE COME BACK WITH A FAIR AMOUNT OF

10:39AM 1 AMBIGUITY. SO I JUST -- MY FEAR ON YOUR APPROACH, WHICH I

10:39AM 2 APPRECIATE, IS WE'RE GOING TO FIND OURSELVES BACK HERE IN

10:39AM 3 60 DAYS IN THE SAME SPOT THAT WE'RE IN NOW.

10:39AM 4 THE COURT: THAT WOULD BE DISAPPOINTING, WOULDN'T

10:39AM 5 IT?

10:39AM 6 MR. WADE: IT WOULD BE VERY DISAPPOINTING. AND IF

10:40AM 7 THAT 60 DAYS CAME WITH THE SUBPOENA POWER OF JUST TO BRING IN

10:40AM 8 THE APPROPRIATE WITNESSES AND TO EXPLORE IN AN EVIDENTIARY

10:40AM 9 HEARING WHY THESE MATERIALS HAVE NOT BEEN GATHERED, FRANKLY,

10:40AM 10 ASSURANCES -- I'M SURE THE COURT SAW IT APPEARS THAT SOME

10:40AM 11 MATERIALS FROM THE CDPH WERE NOT PRESERVED AND MAY HAVE BEEN

10:40AM 12 DESTROYED. THOSE ARE EXONERATORY MATERIALS FOR MS. HOLMES AND

10:40AM 13 MR. BALWANI. SO WE WANT TO MAKE SURE THAT --

10:40AM 14 THE COURT: WELL, ARE THEY? WE DON'T KNOW IF

10:40AM 15 THEY'RE EXONERATORY BECAUSE WE DON'T KNOW WHAT THEY ARE. THEY

10:40AM 16 COULD VERY WELL BE. BUT I UNDERSTAND THAT NOTES ARE NOT

10:40AM 17 AVAILABLE NOW, THEY'RE GONE.

10:40AM 18 MR. WADE: WELL, WHAT WE DO KNOW, YOUR HONOR, IS

10:40AM 19 THAT THE LAB INSPECTORS CAME IN AND AUDITED THE LAB AND

10:40AM 20 BASICALLY GAVE A CLEAN BILL OF HEALTH, WHICH WAS KNOWN TO BOTH

10:40AM 21 OF THE DEFENDANTS IN THIS CASE AND IS CLEARLY VERY RELEVANT TO

10:40AM 22 THEIR INTENT AND BELIEF THAT EVERYTHING WAS GOING WELL IN THE

10:40AM 23 LAB.

10:40AM 24 THE COURT: SO THAT'S A FACT THAT THERE'S NOT GOING

10:40AM 25 TO BE MUCH DISPUTE ABOUT, BUT WHAT YOU'RE SAYING IS THAT THE

10:40AM 1 NOTES OF THAT INSPECTION WOULD HAVE BEEN HELPFUL TO DRILL DOWN.

10:40AM 2 MR. WADE: ABSOLUTELY.

10:41AM 3 THE COURT: SURE. OKAY.

10:41AM 4 MR. WADE: AND BRADY MATERIAL WE THINK, YOUR HONOR.

10:41AM 5 THE COURT: WELL, IT SOUNDS LIKE THE EVIDENCE IS NOT

10:41AM 6 GOING TO BE, AND I DON'T WANT TO GET INTO THE EVIDENCE, BUT IT

10:41AM 7 SOUNDS LIKE THERE'S NOT GOING TO BE MUCH DISPUTE THAT THAT

10:41AM 8 AGENCY CAME IN AND GAVE A CLEAN BILL OF HEALTH FOR WHATEVER

10:41AM 9 REASON. THE NOTES THEMSELVES MIGHT HAVE BEEN PART OF

10:41AM 10 ADDITIONAL INFORMATION, BUT ANYHOW, I UNDERSTAND YOUR POINT.

10:41AM 11 LET ME JUST MOVE TO ONE SPECIFIC AREA, AND THIS IS WITH

10:41AM 12 THE S.E.C. APPARENTLY, AS TO THE S.E.C. THE GOVERNMENT HAS

10:41AM 13 AGREED TO MAKE AVAILABLE TO THE DEFENSE THE AGENT NOTES OF

10:41AM 14 WITNESS INTERVIEWS I THINK. I THINK THAT'S WHAT I READ FROM

10:41AM 15 YOUR PLEADINGS.

10:41AM 16 MR. BOSTIC: SO, YOUR HONOR, AS TO AGENT NOTES, FOR

10:41AM 17 EXAMPLE, FBI AGENT NOTES, POSTAL INSPECTOR AGENT NOTES, THE

10:41AM 18 GOVERNMENT'S PLAN AND THE OFFER TO THE DEFENSE IS TO MAKE THOSE

10:41AM 19 AVAILABLE FOR THE DEFENSE'S REVIEW. THE DEFENSE CAN THEN BRING

10:41AM 20 TO OUR ATTENTION ANY MATERIAL FROM THOSE NOTES THAT THEY

10:41AM 21 BELIEVE IS BRADY, AND THEN WE CAN TALK ABOUT PRODUCTION.

10:41AM 22 AS TO THE S.E.C., THE GOVERNMENT, THE PROSECUTION DOESN'T

10:41AM 23 HAVE THE SAME ACCESS TO THE S.E.C.'S NOTES THAT WE DO TO, SAY,

10:42AM 24 THE FBI'S NOTES. FOR THAT REASON WHAT WE'RE IN A POSITION TO

10:42AM 25 OFFER THERE IS THAT WE WILL UNDERTAKE A REVIEW OF THOSE S.E.C.

10:42AM 1 NOTES AS IS TRADITIONALLY OUR OBLIGATION UNDER BRADY, AND TAKE
10:42AM 2 APPROPRIATE STEPS IF BRADY MATERIAL IS IDENTIFIED.

10:42AM 3 THE COURT: AND I THINK THE DEFENSE AGREES WITH
10:42AM 4 THAT?

10:42AM 5 MR. WADE: WE DID. WE'VE MET AND CONFERRED
10:42AM 6 EXTENSIVELY WITH THE GOVERNMENT ON THIS. WE HAVE SOME
10:42AM 7 HESITATION BECAUSE THE GOVERNMENT'S ABILITY TO SPOT A LOT OF
10:42AM 8 MATERIAL, THEIR ABILITY TO SPOT WHAT IS APPROPRIATELY
10:42AM 9 CONSIDERED BRADY BY THE DEFENSE SEEMS TO ME TO BE A PRETTY
10:42AM 10 PRECARIOUS ENDEAVOR.

10:42AM 11 THE COURT: THEY GET EXTENSIVE TRAINING ON THAT.
10:42AM 12 THEY GET EXTENSIVE TRAINING AT THEIR SCHOOLS ON THAT. AND THEY
10:42AM 13 KNOW -- I AM SMILING HERE AND WE ARE ALL SMILING ABOUT THAT,
10:42AM 14 BUT LET ME JUST BE CLEAR, BRADY IS A SERIOUS MATTER. IT'S
10:42AM 15 SOMETHING THAT AT LEAST, AND I KNOW THESE COUNSEL, THEY'VE
10:42AM 16 APPEARED IN FRONT OF ME AND THEY'VE TRIED CASES IN FRONT OF ME,
10:42AM 17 AND MY EXPERIENCE IS THAT THEY KNOW THE BRADY RESPONSIBILITY IS
10:43AM 18 ONGOING AND THEY KNOW THAT, THEY KNOW THAT THE COURTS,
10:43AM 19 PARTICULARLY THIS COURT, TAKE THAT VERY SERIOUSLY, AND THEY
10:43AM 20 RECOGNIZE, AS ALL PROSECUTORS DO, THEY PROCEED AT THEIR OWN
10:43AM 21 PERIL WITH BRADY. IT'S TYPICALLY, AND I'M JUST COMMENTING,
10:43AM 22 IT'S TYPICALLY BETTER TO PROCEED OUT OF AN ABUNDANCE OF CAUTION
10:43AM 23 IN THAT REGARD BECAUSE THEY KNOW, AND NOT JUST THESE LAWYERS,
10:43AM 24 BUT PROSECUTORS ACROSS THE COUNTRY KNOW THAT A BRADY VIOLATION
10:43AM 25 COULD PUT IN JEOPARDY THEIR CASE, AND I THINK THEY'RE TAUGHT

10:43AM 1 THAT AND THEY KNOW THAT FROM EXPERIENCE.

10:43AM 2 I'M SAYING IT ON THE RECORD BECAUSE I JUST WANT EVERYONE

10:43AM 3 TO KNOW IT'S A SERIOUS MATTER.

10:43AM 4 MR. WADE: WE APPRECIATE THAT, YOUR HONOR, AND I IN

10:43AM 5 NO WAY MEANT TO SUGGEST OTHERWISE. WE APPRECIATE THAT THE

10:43AM 6 GOVERNMENT AGREED IN NARROWING THE DISPUTES TO TAKE ON THAT

10:43AM 7 OBLIGATION, AND I THINK IN THE FIRST INSTANCE WE'RE WILLING TO

10:43AM 8 ACCEPT THAT FOR THE MOST PART.

10:43AM 9 THERE IS ONE SPECIFIC SET OF WITNESSES, TWO WITNESSES.

10:44AM 10 THE COURT: YES, YOU'RE GOING TO SPEAK ABOUT

10:44AM 11 CRAIG HALL, BRYAN TOLBERT?

10:44AM 12 MR. WADE: YES. THE ISSUE THAT WE THINK WE'VE MADE

10:44AM 13 A NECESSARY SHOWING THAT BRADY WOULD EXIST WITHIN THOSE NOTES

10:44AM 14 AND COMMUNICATIONS WITH COUNSEL SUCH THAT THAT SHOULD BE

10:44AM 15 PROVIDED TO THE DEFENSE AT THIS TIME.

10:44AM 16 THE COURT: YOU WANT AGENT NOTES, S.E.C. AGENT NOTES

10:44AM 17 AND INTERVIEW OF MEMORANDUM REGARDING THEIR INTERVIEWS AND YOU

10:44AM 18 SUGGEST THAT AFTER REVIEWING THE DEPOSITION TESTIMONY OF THOSE

10:44AM 19 WITNESSES THAT THERE'S SOME INCONSISTENCY THAT YOU THINK MIGHT

10:44AM 20 RAISE AN ISSUE OF BRADY.

10:44AM 21 MR. WADE: AND WANTING TO BE SOMEWHAT DISCRETE AND

10:44AM 22 FAIR TO THE PARTICULAR PEOPLE, I WILL SAY THAT HIGHLY PROBATIVE

10:44AM 23 MATERIAL THAT GOES -- THAT IS CENTRAL TO ONE OF THE COUNTS IN

10:44AM 24 THE INDICTMENT.

10:44AM 25 I THINK WE'VE MADE THE NECESSARY SHOWING, AND IT'S SET

10:44AM 1 FORTH IN THE PLEADINGS, AND THERE'S CLEARLY A DISCREPANCY. IN
10:44AM 2 ONE -- ON ONE OCCASION SOMEONE ADMITTED TO A CRIME UNDER
10:44AM 3 CALIFORNIA LAW. ON ANOTHER OCCASION THEY SAID THE OPPOSITE.
10:45AM 4 THAT'S ABOUT AS DIRECT OF A CONTRADICTION AS CAN EXIST.
10:45AM 5 THE COURT: AND YOU WANT S.E.C. COMMUNICATIONS WITH
10:45AM 6 THEM, THAT IS, EITHER OF THESE WITNESSES AND/OR THEIR COUNSEL?
10:45AM 7 MR. WADE: CORRECT.
10:45AM 8 THE COURT: YOU'RE SUGGESTING E-MAILS OR LETTERS
10:45AM 9 THAT PERHAPS MIGHT SCHEDULE INTERVIEWS OR FOLLOWUP, THAT TYPE
10:45AM 10 OF THING? YOU'RE NOT SEEKING PRIVILEGED INFORMATION.
10:45AM 11 MR. WADE: WE'RE NOT SEEKING PRIVILEGED INFORMATION
10:45AM 12 EXCEPT THAT WE ARE SEEKING NOTES. SO WHETHER -- WE'RE
10:45AM 13 REVIEWING OTHER NOTES IN THE CASE SO I AM ASSUMING THAT THE
10:45AM 14 GOVERNMENT IS NOT TAKING THE POSITION THAT NOTES OF THEIR
10:45AM 15 MEETING WITH THE WITNESSES WOULD BE PRIVILEGED OR AREN'T
10:45AM 16 AVAILABLE FOR PRODUCTION.
10:45AM 17 SO WE'RE NOT SEEKING ANYTHING THAT WE DON'T THINK WE'RE
10:45AM 18 ENTITLED TO UNDER RULE 16 AND BRADY.
10:45AM 19 THE COURT: OKAY.
10:45AM 20 MR. WADE: EVEN IF IT WAS PRIVILEGED, FRANKLY, YOUR
10:45AM 21 HONOR, GIVEN THAT IT'S BRADY, I THINK UNDER NINTH CIRCUIT LAW
10:45AM 22 THOSE CLAIMS WOULD -- THE PRIVILEGE ASSERTIONS WOULD YIELD TO
10:45AM 23 THE GOVERNMENT'S BRADY OBLIGATION.
10:46AM 24 BUT I THINK THE GOVERNMENT HASN'T TAKEN THE POSITION
10:46AM 25 NECESSARILY THAT THOSE MATERIALS ARE PRIVILEGED.

10:46AM 1 IF IT WANTS TO MAKE SOME OFFERING AS TO SOME ALTERNATIVE
10:46AM 2 MEANS TO PROVIDE THAT, WE'RE OPEN TO BEING REASONABLE, BUT IT
10:46AM 3 SEEMS LIKE THE CLEAREST WAY IS TO PROVIDE THE NOTES IN --
10:46AM 4 THE COURT: WELL, YOU'RE ALWAYS GOING TO BE
10:46AM 5 REASONABLE, I KNOW THAT.
10:46AM 6 SO LET ME JUST ADD, MR. BOSTIC, WHAT ABOUT GETTING THAT
10:46AM 7 INFORMATION? CAN YOU SECURE THAT?
10:46AM 8 MR. BOSTIC: YOUR HONOR, I'LL ADDRESS THAT. I DO
10:46AM 9 HAVE SOME POINTS TO MAKE ABOUT THE FDA AND CMS DOCUMENTS AS
10:46AM 10 WELL.
10:46AM 11 THE COURT: WE'LL GET BACK TO THAT.
10:46AM 12 MR. BOSTIC: BUT WHILE WE'RE ON THIS TOPIC, I THINK
10:46AM 13 THE DEFENSE'S PROPOSAL STILL SKIPS A STEP FOR NO REASON. I
10:46AM 14 THINK IT SKIPS A STEP OF THE PROSECUTION REVIEWING THOSE
10:46AM 15 MATERIALS AND REACHING A POSITION AS TO WHETHER THOSE MATERIALS
10:46AM 16 CONTAIN BRADY INFORMATION OR NOT.
10:46AM 17 I THINK IN IDENTIFYING THE ISSUE THAT THE DEFENSE HAS
10:46AM 18 IDENTIFIED IT WILL INFORM THAT PROCESS, IT WILL ALLOW THE
10:46AM 19 GOVERNMENT TO CONDUCT THAT REVIEW WITH A KNOWLEDGE OF WHAT THE
10:47AM 20 DEFENSE IS CONCERNED ABOUT AND THAT WILL ONLY SERVE TO INCREASE
10:47AM 21 THE RELIABILITY OF THE GOVERNMENT'S REVIEW.
10:47AM 22 BUT I DON'T --
10:47AM 23 THE COURT: HOW WOULD THOSE -- I'M SORRY TO
10:47AM 24 INTERRUPT YOU.
10:47AM 25 HOW IS THAT ANALYSIS DIFFERENT THAN YOUR AGREEMENT TO GIVE

10:47AM 1 AGENT NOTES REGARDING WITNESS INTERVIEWS? IS THERE A
10:47AM 2 DISTINCTION?

10:47AM 3 MR. BOSTIC: THE DISTINCTION -- AT LEAST ONE
10:47AM 4 DISTINCTION, YOUR HONOR, IS THE LEVEL OF THE PROSECUTION'S
10:47AM 5 ACCESS TO THE MATERIALS THAT WE'RE TALKING ABOUT.

10:47AM 6 WHEN IT COMES TO FBI AGENT NOTES, POSTAL INSPECTOR AGENT
10:47AM 7 NOTES, THE PROSECUTION HAS NEEDED ONLY TO REQUEST THOSE
10:47AM 8 MATERIALS FROM THE AGENCIES, AND WE'VE OBTAINED THEM.

10:47AM 9 WHEN IT COMES TO THE S.E.C., WE DON'T HAVE THAT SAME
10:47AM 10 RELATIONSHIP WITH THEM. WE DON'T HAVE THAT LEVEL OF CONTROL,
10:47AM 11 THE ABILITY TO DIRECT THEM TO SHARE THOSE MATERIALS WITH US,
10:47AM 12 AND --

10:47AM 13 THE COURT: I WONDER IF THERE'S AN S.E.C. ATTORNEY
10:47AM 14 IN THE ROOM THAT MIGHT ACCEDE TO THAT REQUEST?

10:47AM 15 MR. BOSTIC: YOUR HONOR, MY UNDERSTANDING, I DON'T
10:47AM 16 WANT TO SPEAK FOR THE S.E.C., BUT BASED ON OUR CONVERSATIONS
10:47AM 17 WITH THEM THE OFFER THAT THEY HAVE MADE AND THAT WE APPRECIATE
10:48AM 18 IS TO ALLOW US ACCESS TO CONDUCT THAT REVIEW OURSELVES AND
10:48AM 19 DETERMINE WHETHER THERE IS BRADY INFORMATION PRESENT IN THOSE
10:48AM 20 MATERIALS.

10:48AM 21 I THINK IT'S UNDERSTANDABLE THAT THE S.E.C. MIGHT BE
10:48AM 22 RESISTANT TO THE IDEA OF TURNING OVER THOSE MATERIALS TO THE
10:48AM 23 DEFENSE, PARTLY BECAUSE MR. BALWANI IS CURRENTLY ENGAGED IN
10:48AM 24 ACTIVE LITIGATION AGAINST THE S.E.C. IN A CIVIL MATTER.

10:48AM 25 SO GIVEN THAT THE STANDARD APPROACH WITH BRADY MATERIALS

10:48AM 1 IS FOR THE PROSECUTION TO UNDERTAKE THAT REVIEW, THAT IS AN
10:48AM 2 OBLIGATION THAT RESTS ON THE PROSECUTION, IT'S SELF-EXECUTING,
10:48AM 3 IT DOESN'T REQUIRE A COURT ORDER. THE CASES ARE VERY CLEAR ON
10:48AM 4 THAT.

10:48AM 5 TO ECHO THE COURT'S EARLIER COMMENTS, IT'S ABSOLUTELY
10:48AM 6 SOMETHING THAT THE PROSECUTORS IN THIS CASE TAKE VERY
10:48AM 7 SERIOUSLY. GIVEN THAT THAT OBLIGATION IS ALREADY ON US, WE'VE
10:48AM 8 TAKEN THE STEP TO GO BEYOND THAT AS TO THE FBI POSTAL INTERVIEW
10:48AM 9 NOTES AND TO ACTUALLY LET THE DEFENSE PARTICIPATE IN THAT
10:48AM 10 REVIEW.

10:48AM 11 AS TO THE S.E.C., WE'RE NOT IN A POSITION TO MAKE THAT
10:48AM 12 OFFER, AND I DON'T THINK THE DEFENSE IS ENTITLED TO ANYTHING
10:49AM 13 MORE THAN HAVING US CONDUCT THAT REVIEW IN GOOD FAITH, YOUR
10:49AM 14 HONOR.

10:49AM 15 THE COURT: WELL, THIS IS A BRADY REQUEST FOR THESE
10:49AM 16 NOTES FROM THESE WITNESSES.

10:49AM 17 MR. WADE: IT IS A VERY SPECIFIC BRADY REQUEST BASED
10:49AM 18 ON VERY SPECIFIC INFORMATION AND A VERY SPECIFIC OFFERING.

10:49AM 19 THE GOVERNMENT HAS BEEN AWARE OF THIS REQUEST FOR
10:49AM 20 TWO MONTHS NOW AND WE HAVE NOT RECEIVED ANYTHING SO -- AND
10:49AM 21 RESPECTFULLY, WE'RE ALL BUSY SO I, I KNOW THAT THEY DON'T JUST
10:49AM 22 GO AND READ OUR PLEADINGS AND THEN IMMEDIATELY RESPOND TO
10:49AM 23 EVERYTHING THAT WE WRITE.

10:49AM 24 THE COURT: SURE.

10:49AM 25 MR. WADE: BUT THERE'S A LITTLE BIT OF A PATTERN

10:49AM 1 HERE, YOUR HONOR, WHERE WE'RE KIND OF KICKING THE CAN DOWN THE
10:49AM 2 ROAD EXCEPT THE END OF THE ROAD HAS NOW BEEN SET AND IT'S
10:49AM 3 COMING FAST.

10:49AM 4 SO TO THE EXTENT THAT WE ARE CONTINUING TO DEFER THESE
10:49AM 5 ISSUES THAT BRING HUGE AMOUNTS OF WORK AND CHALLENGES FOR THE
10:49AM 6 DEFENSE TO BE PREPARED, TO KEEP THE ROAD METAPHOR, IT'S A
10:50AM 7 LITTLE BIT OF A COLLISION COURSE.

10:50AM 8 THE COURT: I SHOULD ASK MR. BOSTIC HOW QUICKLY HE
10:50AM 9 CAN GET THIS MATERIAL AND GET IT REVIEWED. MAYBE THAT WOULD BE
10:50AM 10 HELPFUL.

10:50AM 11 MR. BOSTIC: THAT'S A GOOD QUESTION, YOUR HONOR. IT
10:50AM 12 WILL DEPEND ON THE SPEED OF WHICH THE S.E.C. CAN PROVIDE IT,
10:50AM 13 BUT THE GOVERNMENT IS HAPPY TO MOVE FORWARD WITH THAT AS
10:50AM 14 QUICKLY AS POSSIBLE.

10:50AM 15 THE COURT: SO SHOULD I GIVE YOU OR TELL YOU I WANT
10:50AM 16 THIS DONE IN X DAYS AND THEN YOU CAN PRESENT THAT TO THE S.E.C.
10:50AM 17 AND THAT WILL GET THEM OFF THEIR SEATS PERHAPS?

10:50AM 18 MR. BOSTIC: WE'LL COMPLY WITH ANY COURT ORDER OF
10:50AM 19 COURSE, YOUR HONOR. I DON'T THINK THAT'S NECESSARY. I DON'T
10:50AM 20 THINK THE S.E.C. HAS BEEN DRAGGING ITS FEET ON THIS. I DON'T
10:50AM 21 WANT TO IMPLY THAT OR GIVE THE COURT THAT IMPRESSION.

10:50AM 22 THE COURT: NOR DO I. BUT I WANT TO GIVE A SIGNAL
10:50AM 23 HERE, AND I HOPE MY COMMENTS ARE NOT OPAQUE. I HOPE THEY'RE
10:50AM 24 CLEAR THAT I REALLY DO WANT THIS PROCESS FOR BOTH OF YOUR
10:50AM 25 BENEFITS, ALL THREE OF YOUR BENEFITS, TO GET FORWARD. LET'S

10:50AM 1 GET THROUGH THIS SO YOU CAN GET ABOUT THE BUSINESS OF TRYING
10:50AM 2 YOUR CASE AND PREPARING YOUR CASES.

10:50AM 3 MR. BOSTIC: LET ME PROVIDE SOME MORE FACTS TO THE
10:51AM 4 COURT IN CONNECTION WITH THESE TWO WITNESSES IN PARTICULAR,
10:51AM 5 MR. TOLBERT AND MR. HALL.

10:51AM 6 THE COURT: SURE.

10:51AM 7 MR. BOSTIC: MY UNDERSTANDING FROM RECENT
10:51AM 8 CONVERSATIONS WITH THE S.E.C. IS THAT AS TO ONE OF THOSE
10:51AM 9 WITNESSES THERE ARE NO INTERVIEW NOTES AT ALL.

10:51AM 10 AS TO THE OTHER, I BELIEVE THERE ARE SOMETHING ON THE
10:51AM 11 ORDER OF FOUR PAGES OF NOTES THAT WE'RE TALKING ABOUT.

10:51AM 12 SO WE'RE TALKING ABOUT A RELATIVELY SMALL UNIVERSE OF
10:51AM 13 MATERIAL THAT NEEDS TO BE REVIEWED. I THINK ONCE WE GET ACCESS
10:51AM 14 TO IT, IT WON'T TAKE LONG FOR US TO GO THROUGH IT.

10:51AM 15 I THINK THE CHANCES OF US MISSING SOMETHING IN THAT VERY
10:51AM 16 SMALL DOCUMENT, I THINK IT'S A SMALL CHANCE OR ACTUALLY NO
10:51AM 17 CHANCE AT ALL. SO I THINK THE PREFERRED APPROACH WOULD STILL
10:51AM 18 BE TO LET THE GOVERNMENT UNDERTAKE THAT REVIEW. I DON'T THINK
10:51AM 19 IT WILL TAKE LONG.

10:51AM 20 IN TURN, THE SMALL AMOUNT OF MATERIAL MEANS THAT IF THERE
10:51AM 21 IS SOMETHING THAT NEEDS TO GO OVER TO THE DEFENSE, IT WON'T BE
10:51AM 22 A MOUNTAIN OF MATERIAL THAT WILL TAKE THEM MONTHS TO REVIEW.
10:51AM 23 IT WILL BE SOMETHING VERY CIRCUMSCRIBED, SOMETHING VERY
10:51AM 24 DISCRETE THAT WON'T THREATEN THE TRIAL PREPARATION PROCESS.

10:51AM 25 THE COURT: THANK YOU. THANK YOU. IT SOUNDS

10:51AM 1 LIKE -- THAT'S VERY REVEALING AND HELPFUL. IT SOUNDS LIKE THIS

10:52AM 2 CAN BE ACCOMPLISHED IN ABOUT TWO WEEKS.

10:52AM 3 MR. BOSTIC: I WOULD HOPE SO, YOUR HONOR.

10:52AM 4 THE COURT: IT SOUNDS LIKE. SO MAY I GIVE YOU

10:52AM 5 TWO WEEKS TO GET THAT DONE AND YOU CAN LET THE S.E.C. KNOW THAT

10:52AM 6 THEY'RE ON THAT DEADLINE?

10:52AM 7 MR. BOSTIC: THAT'S FINE, YOUR HONOR.

10:52AM 8 THE COURT: AND WE CAN GET THAT ACCOMPLISHED. IF

10:52AM 9 IT'S FOUR PAGES, THEN IT'S FOUR PAGES. THEN THEY'LL PROVIDE AN

10:52AM 10 ANSWER, IF THEY DON'T HAVE NOTES AS TO ONE OF THEM, THEY'LL

10:52AM 11 PROVIDE AN AFFIRMATIVE ANSWER THAT THEY DON'T HAVE THE MATERIAL

10:52AM 12 OR SOMETHING AND THAT WOULD ADVISE ALL OF US AS TO THAT

10:52AM 13 MATERIAL.

10:52AM 14 MR. WADE: THAT SEEMS REASONABLE, YOUR HONOR.

10:52AM 15 THE COURT: OKAY. GREAT. THANK YOU.

10:52AM 16 YOU WANTED TO GO BACK TO CMS AND FDA.

10:52AM 17 MR. BOSTIC: YES. THANK YOU, YOUR HONOR. I WON'T

10:52AM 18 TALK LONG ABOUT THE IMPORTANCE OF THESE DOCUMENTS. THE

10:52AM 19 GOVERNMENT IS NOT ARGUING THAT DOCUMENTS HELD BY FDA AND CMS

10:52AM 20 ARE RELEVANT. WE DID GO THROUGH THE STEP OF COLLECTING

10:52AM 21 SIGNIFICANT AMOUNTS OF DOCUMENTS FROM THOSE AGENCIES.

10:52AM 22 I DO WANT TO MAKE SURE THAT THE CONTEXT IS NOT LOST,

10:52AM 23 THOUGH.

10:52AM 24 THE INDICTMENT ALLEGES, I BELIEVE, NINE DIFFERENT

10:53AM 25 CATEGORIES OF FALSE STATEMENTS THE DEFENDANTS MADE IN

10:53AM 1 FURTHERANCE OF THEIR SCHEMES TO DEFRAUD.

10:53AM 2 THERE ARE MISREPRESENTATIONS ABOUT THE FDA'S APPROVAL OR

10:53AM 3 WHAT WAS REQUIRED BY WAY OF FDA APPROVAL IS ONLY ONE OF THOSE

10:53AM 4 NINE CATEGORIES.

10:53AM 5 THE GOVERNMENT COLLECTED AND PRODUCED TO THE DEFENSE, I

10:53AM 6 BELIEVE, APPROXIMATELY 300,000 PAGES OF DOCUMENTS FROM THOSE

10:53AM 7 AGENCIES. THAT REPRESENTS ABOUT 2 PERCENT OF THE GOVERNMENT'S

10:53AM 8 PRODUCTION IN THIS CASE.

10:53AM 9 SO I WOULD PUSH BACK ON THE DEFENSE'S CHARACTERIZATION

10:53AM 10 THAT THE GOVERNMENT'S CASE HERE RESTS ON DOCUMENTS FROM THOSE

10:53AM 11 AGENCIES. I THINK THAT'S OVERSTATING IT BY QUITE A BIT.

10:53AM 12 BUT THAT SAID, THESE AGENCIES DO HAVE RELEVANT

10:53AM 13 INFORMATION. OUR ORIGINAL REQUESTS TO THE AGENCIES WERE

10:53AM 14 TAILORED TO CAPTURE THE MOST RELEVANT INFORMATION THAT THOSE

10:53AM 15 AGENCIES HAD.

10:53AM 16 THERE'S NO SHOWING HERE, DESPITE THE DEFENSE'S

10:53AM 17 IMPLICATIONS, THAT THE GOVERNMENT CHERRY PICKED DOCUMENTS FROM

10:53AM 18 THESE AGENCIES, THAT WE CRAFTED OUR REQUESTS TO CAPTURE

10:54AM 19 INculpatory MATERIAL ONLY AND TOLD THEM TO KEEP THE EXculpatory

10:54AM 20 MATERIAL SO THAT WE DIDN'T HAVE TO TURN IT OVER. THERE'S NO

10:54AM 21 HINT OF THAT, AND, INDEED, I'LL REPRESENT TO THE COURT THAT OF

10:54AM 22 COURSE THAT'S NOT WHAT HAPPENED.

10:54AM 23 THE GOVERNMENT'S CONVERSATIONS WITH THOSE AGENCIES

10:54AM 24 DEFINING WHAT NEEDED TO BE COLLECTED AGAIN FOCUSSSED ON THE GOAL

10:54AM 25 OF OBTAINING THE THINGS THAT WERE MOST IMPORTANT, THE THINGS

10:54AM 1 THAT HELPED US SHOW WHAT, IN FACT, HAPPENED, WHETHER THAT WAS
10:54AM 2 EXONERATORY OR INNOCENTIARY.

10:54AM 3 THE DEFENSE'S DEMAND FOR ADDITIONAL DOCUMENTS FROM THOSE
10:54AM 4 AGENCIES, THE GOVERNMENT IS NOT OPPOSING THIS MOTION BECAUSE WE
10:54AM 5 DON'T WANT THEM TO HAVE THOSE DOCUMENTS. I THINK THE RECORD
10:54AM 6 SHOULD ESTABLISH THAT.

10:54AM 7 OUR GENERAL APPROACH TO DISCOVERY IN THIS CASE HAS BEEN WE
10:54AM 8 COLLECT MATERIALS FROM A THIRD PARTY, WE TURN EVERYTHING OVER
10:54AM 9 TO THE DEFENSE. WE PRODUCED 20 MILLION PAGES. WE'RE PRODUCING
10:54AM 10 ADDITIONAL PAGES, SOME THAT WE HAVEN'T EVEN HAD A CHANCE TO
10:54AM 11 REVIEW YET.

10:54AM 12 IT IS NOT A GOAL OF OURS TO KEEP THE DEFENSE FROM HAVING
10:54AM 13 THE DOCUMENTS THAT IT THINKS IT NEEDS TO PREPARE ITS DEFENSE AT
10:55AM 14 TRIAL.

10:55AM 15 THE REASON WE'RE OPPOSING AND THE REASON THE GOVERNMENT
10:55AM 16 HAS CONCERN ABOUT THE COURT'S PROPOSAL TO POTENTIALLY ISSUE AN
10:55AM 17 ORDER DOWN THE ROAD FOCUSES ON THE GOVERNMENT'S ACCESS TO THESE
10:55AM 18 AGENCY MATERIALS AND THAT'S REALLY WHAT THIS ALL COMES DOWN TO.

10:55AM 19 AS MENTIONED IN THE GOVERNMENT'S BRIEFING, THE GOVERNMENT
10:55AM 20 IS NOT CONCEDING MATERIALITY OF THESE MATERIALS. PARTLY THAT'S
10:55AM 21 BECAUSE WE DON'T KNOW WHAT THEY CONTAIN AND THAT AGAIN JUST
10:55AM 22 UNDERSCORES THE POINT THAT WE DON'T HAVE ACCESS TO THEM.

10:55AM 23 IN OTHER CASES THE DEFENSE CITES COURTS HAVE ATTEMPTED TO
10:55AM 24 DETERMINE WHETHER THE PROSECUTION HAS ACCESS TO AN AGENCY'S
10:55AM 25 DOCUMENTS BY EFFECTIVELY ANSWERING THE HYPOTHETICAL QUESTION

10:55AM 1 WHAT WOULD HAPPEN IF THE PROSECUTION TRIED TO OBTAIN THESE
10:55AM 2 DOCUMENTS FROM THE AGENCY? WOULD THEY BE SUCCESSFUL IN GETTING
10:55AM 3 THEM OR NOT?
10:55AM 4 AND IN ANSWERING THAT QUESTION COURTS CAN LOOK TO THINGS
10:55AM 5 LIKE WHAT HAPPENED THE LAST TIME THE PROSECUTION ASKED FOR
10:55AM 6 DOCUMENTS? HOW CLOSELY RELATED ARE THESE AGENCIES IN GENERAL
10:56AM 7 IN CONNECTION WITH THAT SPECIFIC INVESTIGATION? AND THEY CAN
10:56AM 8 USE THOSE FACTS TO REACH A CONCLUSION ABOUT WHAT WOULD HAPPEN
10:56AM 9 IF THE GOVERNMENT SOUGHT DOCUMENTS FROM THE OTHER AGENCY.
10:56AM 10 HERE IT'S NOT A HYPOTHETICAL QUESTION BECAUSE THE
10:56AM 11 PROSECUTION ACTUALLY TOOK THE STEP OF MAKING THOSE FORMAL
10:56AM 12 REQUESTS FOR THE DOCUMENTS TO THE AGENCIES, AND WE HAVE THE
10:56AM 13 RESPONSES BACK FROM THE AGENCIES THAT INDICATE WHAT THEY'RE
10:56AM 14 WILLING TO PRODUCE, WHAT ISSUES NEED TO BE ADDRESSED BEFORE
10:56AM 15 THEY CAN PRODUCE CERTAIN CATEGORIES OF DOCUMENTS.
10:56AM 16 THE DEFENSE IS QUICK TO POINT OUT EVERY QUALIFICATION IN
10:56AM 17 THOSE LETTERS, EVERY TIME THE AGENCIES GAVE SOMETHING OTHER
10:56AM 18 THAN AN UNQUALIFIED AGREEMENT TO PRODUCE, AND THAT'S WHAT
10:56AM 19 THEY'RE HERE COMPLAINING ABOUT.
10:56AM 20 BUT THE VERY FACT THAT THE AGENCIES DIDN'T SIMPLY
10:56AM 21 AUTOMATICALLY AGREE TO GIVE US EVERYTHING CONCLUSIVELY
10:56AM 22 ESTABLISHES THAT WE DON'T HAVE FULL ACCESS TO THOSE MATERIALS.
10:56AM 23 IF WE HAD ACCESS TO THOSE MATERIALS, WE WOULD HAVE
10:56AM 24 REQUESTED THEM, WE WOULD HAVE RECEIVED THEM AS A MATTER OF
10:57AM 25 COURSE, AND WE WOULD BE PRODUCING THEM TO THE DEFENSE AS A

10:57AM 1 MATTER OF COURSE.

10:57AM 2 I ALSO GET THE SENSE FROM THE DEFENSE'S ARGUMENT THAT

10:57AM 3 THEY'RE CONCERNED THAT THE AGENCIES ARE NOT PERCEIVING THESE

10:57AM 4 REQUESTS AS GENUINELY COMING FROM THE GOVERNMENT.

10:57AM 5 ON THAT POINT ALL I CAN SAY IS I WANT TO ASSURE THE

10:57AM 6 DEFENSE AND THE COURT THAT IN MAKING THESE REQUESTS WE DIDN'T

10:57AM 7 MAKE THEM WITH A WINK. WE WEREN'T CROSSING OUR FINGERS WHEN WE

10:57AM 8 PASSED THEM ALONG. IN FACT, WE EXPRESSLY MADE IT CLEAR TO THE

10:57AM 9 AGENCIES THAT ALTHOUGH THEY KNEW THAT THE DEFENSE HAD COME UP

10:57AM 10 WITH THESE CATEGORIES, THAT WE WANTED THEM TO VIEW THESE

10:57AM 11 REQUESTS AS COMING DIRECTLY FROM THE U.S. ATTORNEY'S OFFICE AND

10:57AM 12 THAT WE WANTED THEM TO TREAT THEM AS SUCH REGARDLESS OF THE

10:57AM 13 FACT THAT THEY ORIGINATE WITH THE DEFENSE.

10:57AM 14 AND I HAVE NO REASON TO THINK THAT THE AGENCIES ARE DOING

10:57AM 15 ANYTHING OTHER THAN WHAT HAS BEEN REQUESTED IN THAT REGARD.

10:57AM 16 WHEN IT COMES TO THE SEQUENCE OF EVENTS HERE, AGAIN, I

10:57AM 17 THINK IT UNDERSCORES THE POINT THAT WE AREN'T WORRIED ABOUT THE

10:57AM 18 DEFENSE HAVING THESE DOCUMENTS; THAT WE MADE THIS REQUEST,

10:58AM 19 DESPITE THE FACT THAT WE DON'T BELIEVE THAT WE'RE REQUIRED TO

10:58AM 20 COLLECT THESE DOCUMENTS; THAT WE DID NOT WAIT FOR A COURT

10:58AM 21 ORDER; THAT EVEN AFTER WE OFFERED TO MAKE THAT REQUEST AND THE

10:58AM 22 DEFENSE REJECTED THAT OFFER, WE STILL WENT AHEAD AND MADE THE

10:58AM 23 REQUEST TO THE AGENCIES TO SEE WHAT WE COULD OBTAIN.

10:58AM 24 I THINK GENERALLY THE NEWS FROM THOSE AGENCIES, THE

10:58AM 25 RESPONSES, ARE FAVORABLE TO THE DEFENSE. I THINK THERE'S

10:58AM 1 REASON TO BE OPTIMISTIC IS THAT A LOT OF THE REQUESTED
10:58AM 2 DOCUMENTS WILL BE HEADED THE DEFENSE'S WAY ONCE WE OVERCOME THE
10:58AM 3 REASONABLE ISSUES THAT THE AGENCIES HAVE RAISED.
10:58AM 4 THE PROCEDURAL PROBLEM, I THINK, WITH GRANTING THE MOTION
10:58AM 5 AND ISSUING AN ORDER RELATES TO KIND OF WHO THE ORDER WOULD
10:58AM 6 AFFECT AND WHO THE ORDER TARGETS. THERE'S BEEN A LOT OF
10:58AM 7 DISCUSSION HERE TODAY ABOUT POSITIONS THAT THEY HAVE TAKEN AND
10:58AM 8 THEIR OBLIGATIONS, BUT I THINK WE NEED TO DEFINE WHO THOSE
10:58AM 9 PRONOUNS REFER TO. I THINK THE DEFENSE'S REAL QUARREL HERE IS
10:59AM 10 WITH THE AGENCIES AND THE POSITIONS THAT THEY HAVE TAKEN ON
10:59AM 11 RESPONDING TO THE GOVERNMENT'S REQUEST.
10:59AM 12 I DON'T THINK THERE'S ANY LEGITIMATE CRITICISM OF THE
10:59AM 13 PROSECUTION'S ACTIONS HERE BECAUSE WE HAVE PASSED ALONG
10:59AM 14 VERBATIM THE SAME REQUESTS THAT THE DEFENSE MADE.
10:59AM 15 SO REALLY, REALLY THE DISPUTE REMAINING IS ABOUT WHETHER
10:59AM 16 THE AGENCIES ARE CORRECT IN TAKING THE POSITIONS THAT THEY HAVE
10:59AM 17 TAKEN.
10:59AM 18 THE PROBLEM WITH THAT IS THAT THE DEFENSE HAS RAISED THIS
10:59AM 19 ISSUE IN A WAY THAT DOESN'T PUT THOSE AGENCIES IN FRONT OF THE
10:59AM 20 COURT.
10:59AM 21 I AM NOT COUNSEL FOR THOSE AGENCIES. I REPRESENT THE
10:59AM 22 PROSECUTION HERE. BUT I'M NOT A LAWYER FOR THE FDA OR CMS.
10:59AM 23 I'M UNABLE TO SPEAK TO THEM.
10:59AM 24 THE DEFENSE HAS NOT FILED OR SERVED RULE 17 SUBPOENAS ON
10:59AM 25 THOSE AGENCIES. SUBPOENAS LIKE THAT WOULD MAKE THE AGENCIES

10:59AM 1 DIRECTLY ACCOUNTABLE TO THE DEFENSE, WOULD BRING THE AGENCIES
10:59AM 2 BEFORE THE COURT SO THAT ANY ORDER ON A MOTION TO COMPEL WOULD
11:00AM 3 BE BINDING ON THEM, BUT THEY HAVE NOT DONE THAT. THEY HAVE
11:00AM 4 CHOSEN TO RECRUIT THE PROSECUTION TO ACT AS A MIDDLEMAN IN
11:00AM 5 TRYING TO OBTAIN THESE DOCUMENTS. WE'VE DONE EVERYTHING WE CAN
11:00AM 6 IN THAT REGARD BY SERVING THAT REQUEST, AND WE'RE COMMITTED TO
11:00AM 7 CONTINUING TO DO WHATEVER WE CAN TO FACILITATE THE DISCLOSURE
11:00AM 8 OF THOSE DOCUMENTS.

11:00AM 9 BUT AN ORDER GRANTING THIS MOTION IT SEEMS TO ME WOULD
11:00AM 10 BIND THE PROSECUTION AND REQUIRE ACTION THAT WE HAVE ALREADY
11:00AM 11 TAKEN.

11:00AM 12 IT SEEMS LIKE IT WOULD NOT BE BINDING ON THE AGENTS -- OR
11:00AM 13 I'M SORRY, ON THE AGENCIES BECAUSE THE AGENCIES ARE NOT BEFORE
11:00AM 14 THE COURT IN THIS MATTER.

11:00AM 15 AGAIN, THAT'S A CHOICE THAT THE DEFENDANTS MADE TO IGNORE
11:00AM 16 THE MECHANISM THAT THEY HAVE TO ACTUALLY BRING THOSE AGENCIES
11:00AM 17 WITHIN THE JURISDICTION OF THE COURT.

11:00AM 18 THE COURT: I THINK THAT'S A FAIR OBSERVATION. I'LL
11:00AM 19 HEAR FROM THE DEFENSE, OF COURSE. BUT IT SOUNDS LIKE WHAT THE
11:00AM 20 DEFENSE IS SAYING IS THAT, WELL, YOU CAN USE YOUR OFFICE AS A
11:01AM 21 CONDUIT, IF YOU WILL, AND I DON'T MEAN THAT PEJORATIVELY. BUT
11:01AM 22 IF YOU JUST FOLLOW SANTIAGO AND THE OTHER CASES THAT SUGGEST
11:01AM 23 THAT THE GOVERNMENT DOES HAVE AUTHORITY THROUGH THAT CASE LINE
11:01AM 24 AND THOSE THEORIES IN THAT CASE, AND, THEREFORE, YOU DO STAND
11:01AM 25 IN THE SHOES, IF YOU WILL, AND THEY'RE IN YOURS OR YOU'RE IN

11:01AM 1 THEIRS TO MAKE THAT ORDER. I THINK THAT'S PART OF THEIR
11:01AM 2 ARGUMENT IF NOT THEIR ENTIRE ARGUMENT SAYING, JUDGE, YOU CAN
11:01AM 3 ISSUE THE ORDER TODAY.

11:01AM 4 I SUGGESTED EARLIER, WELL, I'LL GIVE YOU SOME TIME, AND IF
11:01AM 5 WHEN THAT TIME COMES UP IT'S INSUFFICIENT, THAT MAYBE I INVITE
11:01AM 6 AND EXTEND AN INVITATION TO MS. DYER AND MS. NORTON TO COME TO
11:01AM 7 THIS COURTROOM AND ENJOY SAN JOSE AND TELL US WHAT THE STATUS
11:01AM 8 OF THINGS ARE.

11:01AM 9 I THINK WE CAN, I THINK WE CAN DO SOMETHING -- SOME
11:01AM 10 ALTERNATIVE TO HAVING THEM APPEAR, AND I'M NOT AT ALL ADVERSE
11:01AM 11 TO HAVE THEM DO THAT. I WANT THE DEFENSE TO GET WHAT THEY'RE
11:01AM 12 ENTITLED TO. I BELIEVE YOU DO, TOO, THAT'S MY SENSE, SO WE CAN
11:02AM 13 GET THE TRIAL GOING.

11:02AM 14 AS WE ALL KNOW, SOMETIMES THE HARDEST THING IS JUST
11:02AM 15 GETTING STARTED.

11:02AM 16 MR. BOSTIC: WE DO HAVE THE SAME GOAL, YOUR HONOR.
11:02AM 17 BUT WHAT THE DEFENSE IS ENTITLED TO CAN GO NO FURTHER THAN WHAT
11:02AM 18 THE PROSECUTION HAS ACCESS TO.

11:02AM 19 THE COURT: SURE.

11:02AM 20 MR. BOSTIC: AND I THINK WE HAVE DEMONSTRATED THE
11:02AM 21 EXTENT OF OUR ACCESS BY MAKING THESE REQUESTS FORMALLY IN GOOD
11:02AM 22 FAITH AND GETTING THESE RESPONSES BACK FROM THE AGENCIES.

11:02AM 23 LIKE I SAID, WE'LL CONTINUE TO PUT IN EFFORTS TO TRY TO
11:02AM 24 SECURE THESE DOCUMENTS AND OVERCOME THE ISSUES THAT HAVE BEEN
11:02AM 25 RAISED BY THE AGENCIES, BUT RULE 16 AND BRADY CANNOT ENCOMPASS

11:02AM 1 THINGS THAT WE CAN'T GET OUR HANDS ON.

11:02AM 2 THE COURT: SURE. AND YOU'RE NOT SAYING THIS, AND

11:02AM 3 I'M NOT TRYING TO PUT YOU IN A POSITION WHERE YOU ARE,

11:02AM 4 MR. BOSTIC, BUT IT ALMOST SEEMS LIKE, WELL, GEE, JUDGE, IF YOU

11:02AM 5 JUST ISSUE THE ORDER THAT WOULD BE HELPFUL TO US BECAUSE THEN

11:02AM 6 IT IS OUT OF OUR HANDS AND WE CAN GO TO MS. DYER AND MS. NORTON

11:02AM 7 AND SAY THIS IS WHAT THAT MEAN JUDGE IN SAN JOSE TOLD US TO DO

11:03AM 8 AND YOU BETTER COMPLY.

11:03AM 9 MR. BOSTIC: QUITE -- IT'S ACTUALLY I BELIEVE THE

11:03AM 10 OPPOSITE, YOUR HONOR. I THINK THAT WOULD PUT US IN A MORE

11:03AM 11 DIFFICULT POSITION BECAUSE WE WOULD BE SET UP TO HAVE TO COMPLY

11:03AM 12 WITH THE COURT ORDER THAT WAS IN A WAY OUT OF OUR HANDS.

11:03AM 13 IF THE COURT ORDERS US TO OBTAIN AND PRODUCE THESE

11:03AM 14 MATERIALS, WELL, WE'VE ALREADY TAKEN STEPS TOWARDS THAT AND

11:03AM 15 HOPEFULLY WE CAN ACCOMPLISH IT, BUT ULTIMATELY IT IS NOT UP TO

11:03AM 16 US WHETHER WE CAN GET THESE MATERIALS, AT LEAST NOT ALL OF

11:03AM 17 THEM, AND THAT'S WHAT I'VE BEEN SAYING TO THE DEFENSE ALL

11:03AM 18 ALONG. THAT'S THE REASON WHY HAVING THAT ORDER DIRECTED AT THE

11:03AM 19 PROSECUTION WOULD MAKE US NERVOUS.

11:03AM 20 THE COURT: NO, I APPRECIATE THAT. I THINK WHEN I

11:03AM 21 CAME OUT AND TOLD YOU MY COMMENTS ABOUT GIVING THIS 60 DAYS,

11:03AM 22 WHATEVER IT IS, FORWARD TO LET THIS, WHAT HAS ALREADY BEEN

11:03AM 23 ENGAGED BEFORE, THAT WAS THE THOUGHT I HAD IN MIND, COUNSEL,

11:03AM 24 WAS DISRUPT THAT WITH AN ORDER NOW BUT PERHAPS THE THREAT OF AN

11:03AM 25 ORDER, IF THAT IS WHAT IT IS, THE PROMISE OF AN ORDER COMING

11:03AM 1 FORWARD AND MR. BOSTIC WOULD GO TO HIS OTHER AGENCIES, OR NOT

11:03AM 2 HIS BUT THE OTHER AGENCIES, IN THE CASE AND INFORM THEM OF

11:04AM 3 THAT, THE COURT'S FIRM THOUGHTS ABOUT THIS.

11:04AM 4 MR. WADE: YOUR HONOR, WITH ALL DUE RESPECT TO MY

11:04AM 5 COLLEAGUE, I'M NOT ENCOURAGED BY WHAT I'M HEARING. THE LAW IS

11:04AM 6 CLEAR. THIS ISN'T VOLUNTARY AND HISTORY DIDN'T START WHEN WE

11:04AM 7 MADE THESE REQUESTS, OKAY? THE GOVERNMENT WAS ABLE TO ACT WITH

11:04AM 8 THESE AGENCIES FOR YEARS. THE GOVERNMENT WAS ABLE TO GET

11:04AM 9 ACCESS TO THESE DOCUMENTS FOR YEARS.

11:04AM 10 THE ONLY TIME THERE'S ANY INDICATION OF ANY RESISTANCE TO

11:04AM 11 THAT IS WHEN THE DEFENSE MAKES THE REQUEST.

11:04AM 12 SANTIAGO, BRYAN, THE W.R. GRACE CASE, THE LIBBY CASE IN

11:04AM 13 THE D.D.C., ALL OF THESE CASES ARE DESIGNED TO ADDRESS EXACTLY

11:04AM 14 THIS SITUATION WHERE THE GOVERNMENT HAS THE DOORS OPEN TO IT

11:04AM 15 BUT WHEN THE DEFENSE COMES AND MAKES THE REQUEST FOR ITS

11:04AM 16 DOCUMENTS THAT ARE MATERIAL TO THE PREPARATION OF THE DEFENSE,

11:05AM 17 THOSE DOORS CLOSE. THAT -- THE LAW MAKES CLEAR AND IN THE

11:05AM 18 NINTH CIRCUIT THEY'RE NOT CLOSED. THAT ACCESS REMAINS.

11:05AM 19 AND I HEAR THE GOVERNMENT SUGGESTING THAT THAT'S NOT THE

11:05AM 20 CASE AND THAT THEY DON'T HAVE THAT ACCESS WHEN THE HISTORY OF

11:05AM 21 THEIR INTERACTIONS WITH THESE AGENCIES MAKES CLEAR OTHERWISE

11:05AM 22 AND THE LAW MAKES CLEAR THAT THERE SHOULD BE AN OBLIGATION THAT

11:05AM 23 RESTS WITH THIS PROSECUTION TEAM. THAT'S WHY I SHARE THE

11:05AM 24 COURT'S INCLINATION THAT AN ORDER MAY HELP THEM BECAUSE I

11:05AM 25 ACCEPT THEIR WORD THAT THEY WANT US TO HAVE THESE MATERIALS,

11:05AM 1 AND THAT'S WHY I WONDER WHETHER AN ORDER WILL JUST HELP MOVE
11:05AM 2 THINGS ALONG BECAUSE WHILE YOUR -- WHILE THE COURT WAS CLEAR IN
11:05AM 3 GIVING SOME GUIDANCE AND SOME THOUGHTS ON APPROPRIATE NEXT
11:05AM 4 STEPS AND THE TIMING OF THOSE STEPS, WHAT WE HEARD IN RESPONSE
11:06AM 5 TO A DEGREE WAS, BUT IT'S BEYOND OUR CONTROL. IT NEEDS TO BE
11:06AM 6 RECOGNIZED THAT THERE IS AN OBLIGATION HERE, NOT A COURTESY.
11:06AM 7 THAT'S WHAT THE LAW REQUIRES.

11:06AM 8 MR. BOSTIC: AND, YOUR HONOR, THAT'S TRUE ONLY IF
11:06AM 9 THE GOVERNMENT HAS ACCESS TO THOSE MATERIALS. THE OBLIGATION
11:06AM 10 IS COEXTENSIVE WITH THE ACCESS, AND I THINK THE EXTENT OF OUR
11:06AM 11 ACCESS IS BEST DEMONSTRATED BY THE AGENCY'S RESPONSES, AT LEAST
11:06AM 12 THAT'S THE BEST AND MOST RELIABLE EVIDENCE THAT WE HAVE.

11:06AM 13 I THINK ON THE CASE LAW MAYBE THE DEFENSE MISUNDERSTANDS
11:06AM 14 THE GOVERNMENT'S POINT. THE POINT IS THAT IN EACH OF THOSE
11:06AM 15 CASES AS I READ THEM, NONE OF THEM INVOLVE A SITUATION LIKE
11:06AM 16 THIS WHERE THE GOVERNMENT HAS ACTUALLY TAKEN THE STEP OF
11:06AM 17 REQUESTING THE DOCUMENTS IN QUESTION AND THE AGENCIES HAVE
11:06AM 18 TAKEN THE POSITIONS THAT THEY HAVE TAKEN.

11:06AM 19 IN THOSE CASES THERE WAS A REQUEST AS TO WHETHER THE
11:06AM 20 GOVERNMENT SHOULDN'T BE REQUIRED TO TAKE THAT STEP, BUT HERE
11:07AM 21 WE'VE ALREADY TAKEN IT.

11:07AM 22 I ALSO JUST WANT TO CORRECT THE RECORD ON THE GOVERNMENT'S
11:07AM 23 PREVIOUS ACCESS TO THOSE MATERIALS. THE DEFENSE IS SIMPLY
11:07AM 24 WRONG WHEN IT IMPLIES THAT WE HAD CARTE BLANCHE OR FULL ACCESS
11:07AM 25 TO THE AGENCY'S MATERIALS BEFORE THIS.

11:07AM 1 THE DEFENSE SUBMITS WITH ITS BRIEFING THE HOLD NOTICES
11:07AM 2 THAT WERE SERVED ON THOSE AGENCIES. THEY'RE VERY BROAD. THE
11:07AM 3 DOCUMENTS THAT WE ENDED UP OBTAINING FROM THOSE AGENCIES IS A
11:07AM 4 NARROWER SET, AND PART OF THE REASON FOR THAT IS THAT THE
11:07AM 5 AGENCY'S FILES WERE NOT COMPLETELY OPEN TO US. IT HAS NOT BEEN
11:07AM 6 THE CASE THAT WE CAN WALK IN AND TAKE WHATEVER WE WANTED. THE
11:07AM 7 AGENCY'S JOB IS TO CONSERVE ITS RESOURCES AND MAKE REASONABLE
11:07AM 8 RESPONSES TO REQUESTS FOR DOCUMENTS, AND IT'S CONTINUING TO DO
11:07AM 9 THAT NOW.

11:07AM 10 TO THE EXTENT THAT THE AGENCIES ARE TAKING DIFFERENT
11:07AM 11 POSITIONS NOW FROM THE POSITIONS THAT THEY TOOK EARLIER, MY
11:07AM 12 UNDERSTANDING IS THAT PART OF IT IS THAT THEY DID PREVIOUSLY
11:07AM 13 ALREADY UNDERTAKE THE WORK TO PRODUCE THOSE LARGE BATCHES OF
11:07AM 14 DOCUMENTS AND THEY NEED TO CONSERVE AGENCY RESOURCES GOING
11:08AM 15 FORWARD.

11:08AM 16 THE COURT: IN THE CIVIL CASE?

11:08AM 17 MR. BOSTIC: IN -- SO NOT ONLY IN THE CIVIL CASE,
11:08AM 18 YOUR HONOR, BUT ALSO IN RESPONSE TO THE GOVERNMENT'S EARLIER
11:08AM 19 REQUEST.

11:08AM 20 THEY EXPENDED THE RESOURCES NECESSARY TO PRODUCE WHAT WE
11:08AM 21 ALL BELIEVED WERE THE MOST RELEVANT DOCUMENTS BACK WHEN WE MADE
11:08AM 22 THOSE ORIGINAL REQUESTS, AND THEY ARE UNDERSTANDABLY CAUTIOUS
11:08AM 23 ABOUT UNDERTAKING ANOTHER BIG COLLECTION EFFORT THAT WOULD
11:08AM 24 DUPLICATE A LOT OF THAT PREVIOUS WORK.

11:08AM 25 IN ADDITION, THERE ARE LEGAL RESTRICTIONS THAT APPLY I

11:08AM 1 BELIEVE AT LEAST TO THE FDA THAT RESTRICT ITS DISCLOSURE OF
11:08AM 2 DOCUMENTS IN CRIMINAL CASES THAT AREN'T BROUGHT UNDER THE ACT
11:08AM 3 THAT THE AGENCY IS DIRECTED TO ENFORCE.

11:08AM 4 SO THESE ARE THINGS, AGAIN, THAT I'M NOT BEST SITUATED TO
11:08AM 5 ADDRESS. THEY'RE BEST ADDRESSED BY COUNSEL FOR THOSE AGENCIES,
11:08AM 6 BUT THE DEFENSE HAS MADE THE DECISION NOT TO SERVE A RULE 17
11:08AM 7 SUBPOENA THAT WOULD ALLOW THOSE AGENCIES TO MAKE THOSE
11:08AM 8 ARGUMENTS TO THE COURT.

11:08AM 9 SO I THINK THAT'S THE PROCEDURAL PROBLEM.

11:09AM 10 THE COURT: NO, I APPRECIATE THAT. AND THERE IS A
11:09AM 11 DISTINCTION.

11:09AM 12 YOU HAVE, AS YOU HAVE SAID, YOU HAVE ADVANCED THE SIX
11:09AM 13 CATEGORIES TO THE AGENCIES INITIALLY ON THEIR OWN OR AFTER YOUR
11:09AM 14 ASKING, I SHOULD SAY THE DEFENSE ASKED FOR THE CATEGORIES,
11:09AM 15 THOSE HAVE BEEN ADVANCED. THERE HAVEN'T BEEN ANY 17 SUBPOENAS
11:09AM 16 BY THE DEFENSE. YOU'VE BEEN RELYING ON THE PROSECUTION TO
11:09AM 17 PROVIDE THIS INFORMATION ON SANTIAGO AND BRYAN AND THE OTHER
11:09AM 18 CASES THAT YOU CITE.

11:09AM 19 MR. WADE: YES, YOUR HONOR. WE SEE IT AS A LEGAL
11:09AM 20 OBLIGATION. AND JUST SO WE'RE CLEAR, THOSE REQUESTS CAME AFTER
11:09AM 21 THE GOVERNMENT REPEATEDLY SAID NO. AND THEN WE SAID, OKAY,
11:09AM 22 WELL, WE FEEL SUFFICIENTLY STRONGLY ABOUT THE NEED FOR THESE
11:09AM 23 MATERIALS, AND WE'RE GOING TO FILE THE MOTION, AND THEN THE
11:09AM 24 PROMISE OF THE REQUEST CAME, AND THEN A HEARING HAPPENED, AND
11:09AM 25 THEN THE REQUEST CAME IN MAY, THE LETTER WAS SENT.

11:09AM 1 THE LAW CANNOT BE -- THE LAW CAN'T ENCOURAGE A CONTRIVANCE
11:09AM 2 IN A SITUATION LIKE THIS WHERE, OH, NOW THE DEFENSE REQUESTS
11:10AM 3 COME, WE'RE GOING TO PASS THESE THROUGH TO THE AGENCIES, AND
11:10AM 4 YOU JUST SEND US A LETTER BACK THAT SAYS WE DON'T HAVE ACCESS,
11:10AM 5 AND THEN WE DON'T HAVE THE ACCESS. THAT'S SPECIFICALLY WHAT
11:10AM 6 THESE CASES THAT HAVE BEEN CITED TO THE COURT THAT ARE SET
11:10AM 7 FORTH IN THE BRIEF ARE DESIGNED TO PROTECT AGAINST.

11:10AM 8 THE COURT: I UNDERSTAND THAT. THE GOVERNMENT,
11:10AM 9 AGAIN, IT'S NOT WHAT HAPPENED IN THIS CASE, BUT YOU'RE
11:10AM 10 SUGGESTING THAT THE GOVERNMENT CAN'T JUST MAKE A REQUEST AFTER
11:10AM 11 WE SUGGEST WE NEED MORE AND THEN THAT REQUEST BECOMES
11:10AM 12 PROPHYLACTIC AS TO ANYTHING ELSE THAT THEY HAVE TO DO. THAT'S
11:10AM 13 NOT THE WAY IT WORKS.

11:10AM 14 MR. WADE: RIGHT. I APPRECIATE THAT.

11:10AM 15 THE COURT: AND HERE THE GOVERNMENT HAS MADE THIS
11:10AM 16 REQUEST. WE DO HAVE SOME, CANDIDLY, OPAQUE RESPONSES FROM THE
11:10AM 17 AGENCIES INVOLVED HERE, AND I WOULD LOVE TO HAVE MS. DYER AND
11:10AM 18 MS. NORTON HERE TO CLEAR UP SOME OF THIS "FOGGINESS" AS YOU PUT
11:10AM 19 IT.

11:10AM 20 I JUST -- I COMMENTED EARLIER ABOUT MY TAKE IN READING ONE
11:10AM 21 OF THE LETTERS. IT SEEMED TO SAY THAT WE HAVE ALREADY PROVIDED
11:10AM 22 THIS IN THE BALWANI CIVIL CASE, SO LOOK AT THAT, THAT SHOULD
11:10AM 23 SUFFICE THE REQUEST. THAT'S HOW I -- ONE INTERPRETATION OF
11:10AM 24 THAT.

11:11AM 25 MR. BOSTIC: I MIGHT BE ABLE TO CLARIFY THAT.

11:11AM 1 THE COURT: YES, PLEASE.

11:11AM 2 MR. BOSTIC: SO MY UNDERSTANDING FROM CONVERSATIONS

11:11AM 3 WITH THE AGENCIES IS THAT THE SIX DOCUMENT CATEGORIES

11:11AM 4 IDENTIFIED BY THE DEFENSE HERE ARE SUBSETS. THEY'RE INCLUDED

11:11AM 5 WITHIN THE CATEGORIES OF DOCUMENTS THAT MR. BALWANI REQUESTED

11:11AM 6 IN HIS SUBPOENA IN THE S.E.C. CASE. I HAVE NOT HEARD EITHER

11:11AM 7 DEFENDANT DISAGREE WITH THAT, BUT THEY CAN LET US KNOW IF

11:11AM 8 THERE'S SOMETHING THAT IS NOT INCLUDED, BUT THAT'S THE AGENCY'S

11:11AM 9 READING.

11:11AM 10 THEY HAVE ALREADY UNDERTAKEN EFFORTS TO COLLECT RESPONSIVE

11:11AM 11 DOCUMENTS IN RESPONSE TO THE CIVIL SUBPOENA SO THAT WILL IN A

11:11AM 12 WAY FACILITATE THEIR PRODUCTION OF THESE SIX CATEGORIES IN THE

11:11AM 13 CRIMINAL CASE. THEY'RE NOT SAYING THAT MS. HOLMES NEEDS TO

11:11AM 14 RELY ON MR. BALWANI TO SHARE THOSE DOCUMENTS.

11:11AM 15 THEY'RE NOT SAYING I'M NOT GOING TO DO THIS WORK TWICE.

11:11AM 16 THEY'RE SIMPLY POINTING OUT THAT THOSE COLLECTION EFFORTS ARE

11:12AM 17 ALREADY UNDERWAY. WE'RE TALKING ABOUT A SUBSET.

11:12AM 18 THE COURT: WELL, THANK YOU. THAT WAS MY CONCERN

11:12AM 19 THAT THEY WERE SAYING SEE BALWANI.

11:12AM 20 MR. WADE: WELL, YOUR HONOR, WE DO HAVE COUNSEL FOR

11:12AM 21 MR. BALWANI PRESENT IN THE COURTROOM, BUT WE ALSO HAVE THE

11:12AM 22 BENEFIT OF THE PLEADING THAT THEY SUBMITTED IN THIS CASE AND

11:12AM 23 THE FACTS ARE THE FACTS. CMS HAS PRODUCED 43 DOCUMENTS IN

11:12AM 24 RESPONSE TO THE SUBPOENA, AND I DON'T THINK THAT THE FDA HAS

11:12AM 25 AGREED TO PRODUCE MANY OF THE KEY CATEGORIES.

11:12AM 1 MAYBE THEY'RE -- AND I DON'T READ THEIR LETTER AS
11:12AM 2 SUGGESTING OTHERWISE. MAYBE THEIR POSITION WILL CHANGE GIVEN
11:12AM 3 SOME OF THE DIRECTION THAT HAS BEEN PROVIDED BY THE COURT, BUT,
11:12AM 4 AGAIN, I WILL REMAIN OPEN MINDED, YOUR HONOR, BUT I FEAR THAT
11:12AM 5 THE LACK OF AN ORDER IS JUST GOING TO RESULT IN FURTHER DELAY
11:12AM 6 HERE.

11:12AM 7 THE COURT: OKAY.

11:12AM 8 MR. WADE: I DO WANT TO MAKE CLEAR, THE COURT TALKED
11:12AM 9 ABOUT THE IMPORTANCE OF THE BRADY OBLIGATION. THE BRADY
11:13AM 10 OBLIGATION DOES EXTEND TO MATERIALS THAT ARE WITHIN THE -- THAT
11:13AM 11 THE GOVERNMENT HAS ACCESS TO THAT ARE IN CONTROL OF THE
11:13AM 12 GOVERNMENT.

11:13AM 13 UNDER THE NINTH CIRCUIT LAW WE THINK IT'S CLEAR THAT THESE
11:13AM 14 ARE SUCH MATERIALS. SO WE'RE CONFIDENT THAT COUNSEL FOR THE
11:13AM 15 GOVERNMENT WILL MEET ITS BRADY OBLIGATIONS WITH RESPECT TO THE
11:13AM 16 FDA AND CMS, BUT I JUST DON'T WANT ANYTHING TO BE PERCEIVED AS
11:13AM 17 SOME EFFORT TO AVOID UNDERTAKING LEGAL OBLIGATIONS THAT EXIST.
11:13AM 18 WE'RE HAPPY TO CONFER, WE'RE HAPPY TO BE REASONABLE, BUT IN THE
11:13AM 19 JOINTS OF REASONABLENESS I DON'T WANT TO BE -- I DON'T WANT
11:13AM 20 JUSTICE AND FAIRNESS TO BE LOST.

11:13AM 21 THE COURT: OKAY.

11:13AM 22 MR. CAZARES: YOUR HONOR, MAY I ADDRESS SOME OF THE
11:13AM 23 ISSUES?

11:13AM 24 THE COURT: PLEASE.

11:13AM 25 MR. CAZARES: THANK YOU VERY MUCH. STEPHEN CAZARES

11:13AM 1 FOR MR. BALWANI.

11:13AM 2 YOUR HONOR, UNLIKE COUNSEL FOR MS. HOLMES WE'VE HAD, I

11:14AM 3 GUESS, THE BENEFIT OF TRYING TO GET DOCUMENTS FROM THE FDA AND

11:14AM 4 FROM CMS SINCE SEPTEMBER OF 2018.

11:14AM 5 I THINK THAT HISTORY THAT WE'VE RECOUNTED SOMEWHAT IN OUR

11:14AM 6 BRIEF I THINK PROVIDES CONTEXT TO THE OFFERS THAT THE AGENCIES

11:14AM 7 HAVE PROVIDED TO THE COURT HERE THAT YOU HAVE FOCUSED ON IN

11:14AM 8 TRYING TO COME UP WITH SOME SORT OF MIDDLE GROUND, SOME SORT OF

11:14AM 9 RESOLUTION TO AVOID ISSUING AN ORDER HERE.

11:14AM 10 THE COURT: WELL, I'M NOT AVOIDING AN ORDER. I CAN

11:14AM 11 DO THAT. I'M TRYING TO SEE IF THERE'S SOME CONSTRUCTIVE WAY TO

11:14AM 12 GET THE INFORMATION THAT YOUR TEAMS NEED.

11:14AM 13 MR. CAZARES: THAT'S WHAT I WANT TO ADDRESS BECAUSE

11:14AM 14 I THINK IT'S REALLY IMPORTANT TO UNDERSTAND THE DISTINCTION

11:14AM 15 HERE. RULE 16 ISN'T SOME EQUIVALENT TO CIVIL DISCOVERY. IT'S

11:14AM 16 NOT EQUIVALENT TO RULE 17 SUBPOENA IN A CRIMINAL CASE.

11:14AM 17 RULE 16 RELATES TO A DEFENDANT'S CONSTITUTIONAL RIGHT TO

11:14AM 18 PREPARE A DEFENSE. SO THIS IS NOT SOMETHING THAT COULD BE LEFT

11:14AM 19 TO THE DISCRETION OF AGENCY ATTORNEYS, AGENCY REPRESENTATIVES

11:14AM 20 WHETHER OR NOT THEY FEEL IN THEIR DISCRETION THAT THEY WOULD

11:15AM 21 LIKE TO WITHHOLD SOME MATERIALS BECAUSE IT SOMEHOW INVOLVES

11:15AM 22 THEIR INTERNAL DELIBERATIONS ABOUT THEIR REGULATORY OVERSIGHT

11:15AM 23 OF FAIRNESS. THAT'S NOT RULE 16, YOUR HONOR.

11:15AM 24 THE GOVERNMENT IS TRYING TO PUT A WALL BETWEEN THEMSELVES

11:15AM 25 AND CMS AND FDA.

11:15AM 1 NOW, UNDERSTAND, FOR EXAMPLE, IN THE S.E.C. CASE
11:15AM 2 MR. BALWANI ISSUED SUBPOENAS TO THE FDA AND CMS IN SEPTEMBER OF
11:15AM 3 2018. THEY'VE PRODUCED COLLECTIVELY 126 DOCUMENTS. NO
11:15AM 4 INTERNAL COMMUNICATIONS AT ALL.
11:15AM 5 IN THE CRIMINAL INVESTIGATION, FDA PRODUCED INTERNAL
11:15AM 6 E-MAILS TO THE GOVERNMENT IN RELATION TO THEIR CRIMINAL
11:15AM 7 INVESTIGATION, BUT THEY WERE SELECT, YOUR HONOR.
11:15AM 8 MR. BOSTIC REPRESENTS, AND I DON'T FAULT HIM FOR THIS,
11:15AM 9 THAT THEY OBTAINED ALL RELEVANT MATERIAL TO THE CASE AND
11:15AM 10 WEREN'T JUST LOOKING FOR INculPATORY MATERIALS.
11:15AM 11 MAYBE SO.
11:15AM 12 BUT WHAT THE AGENCY GAVE TO THE GOVERNMENT, THE FDA, WERE
11:15AM 13 INTERNAL E-MAIL COMMUNICATIONS ONLY RELATING TO THE SEPTEMBER
11:16AM 14 2015 INSPECTION THAT RESULTED IN ADVERSE FINDINGS AND ACTIONS
11:16AM 15 BY THE AGENCY, BOTH FDA AND CMS, THAT WOUND UP SHUTTING DOWN
11:16AM 16 THE BUSINESS.
11:16AM 17 THE FDA HAD YEARS OF INTERACTION WITH THERANOS RELATING TO
11:16AM 18 THEIR DEVICES AND OVERSIGHT, EXCHANGES BACK AND FORTH, AND
11:16AM 19 LIKELY SIMILAR INTERNAL DELIBERATIONS BY FDA REGULATORS IN
11:16AM 20 THEIR OVERSIGHT OF THE COMPANY. NONE OF THAT WAS PRODUCED IN
11:16AM 21 THE DISCOVERY.
11:16AM 22 THEY'VE ONLY PRODUCED SOME OF THE INTERNAL COMMUNICATIONS
11:16AM 23 RELATING TO AN INSPECTION THAT THEY SUBMIT WAS THE RESULT OF A
11:16AM 24 COMPLAINT THAT RESULTED IN ADVERSE -- BASICALLY ACTION BY THE
11:16AM 25 AGENCY. THE RESULTS OF THAT INSPECTION ARE NOW GOING TO BE

11:16AM 1 USED BY THE GOVERNMENT IN THE CRIMINAL CASE TO SUGGEST
11:16AM 2 WRONGDOING BY THE DEFENDANTS. THAT'S SELECTIVE DISCOVERY, YOUR
11:16AM 3 HONOR. THAT'S NOT OPEN FILE. THAT'S ALSO NOT RULE 16.
11:16AM 4 BECAUSE THE PROBLEM HERE IS THE DEPARTMENT OF JUSTICE
11:16AM 5 REPRESENTS ALL FEDERAL AGENCIES.
11:16AM 6 THESE ARE NOT INDEPENDENT AGENCIES THAT HAVE THESE WALLS
11:17AM 7 BETWEEN THEM.
11:17AM 8 IN THE S.E.C. ACTION IN RESPONSE TO THE SUBPOENAS THAT WE
11:17AM 9 ISSUED TO THE FDA AND CMS, THEY PRODUCED LIMITED DOCUMENTS. WE
11:17AM 10 REACHED A POINT AFTER WE OBTAINED SIMILAR LETTERS TO WHAT THE
11:17AM 11 FDA, FOR EXAMPLE, SUBMITTED ATTACHED TO THE GOVERNMENT'S MOTION
11:17AM 12 HERE.
11:17AM 13 WE'RE GOING TO PRODUCE DOCUMENTS WITHIN A MONTH BUT WITH
11:17AM 14 THIS LAUNDRY LIST OF EXCEPTIONS INCLUDING TRADE SECRET,
11:17AM 15 CONFIDENTIAL COMMERCIAL INFORMATION, DELIBERATIVE PROCESS,
11:17AM 16 CRIMINAL LAW ENFORCEMENT PRIVILEGE, ON TOP OF ATTORNEY-CLIENT
11:17AM 17 PRIVILEGE.
11:17AM 18 NOW, NO ONE HAS AN ISSUE WITH ATTORNEY-CLIENT PRIVILEGE.
11:17AM 19 THE AGENCIES OBVIOUSLY CAN LEGITIMATELY RAISE THAT AND WITHHOLD
11:17AM 20 THOSE DOCUMENTS.
11:17AM 21 ALL OF THESE OTHER CLAIMS THAT THEY'VE RAISED IN THE
11:17AM 22 S.E.C. CASE THAT THE FDA NOW WANTS TO WITHHOLD HERE. A RULE 16
11:17AM 23 ORDER CUTS RIGHT THROUGH THAT BECAUSE NOW YOU'RE GOING TO HAVE
11:17AM 24 AN ORDER FROM THE FEDERAL COURT THAT WILL PERMIT THE AGENCY TO
11:17AM 25 RELEASE THE INFORMATION. THAT IS THE WHOLE POINT. THESE

11:18AM 1 LIMITATIONS ON THE CMS AND FDA IN RELEASING TRADE SECRET, WHICH
11:18AM 2 THEY'RE BRINGING UP, COMMERCIAL INFORMATION AND OTHER
11:18AM 3 CONFIDENTIAL BUSINESS INFORMATION, THOSE RELATE TO THEIR KIND
11:18AM 4 OF PROVIDING INFORMATION LIKE SUBJECT TO FOIA OR OTHER REQUESTS
11:18AM 5 OR EVEN CIVIL LITIGATION. THAT'S NOT AT ISSUE HERE.
11:18AM 6 HERE YOU HAVE A CRIMINAL CASE UNDER RULE 16 A DEFENDANT'S
11:18AM 7 CONSTITUTIONAL RIGHT TO PUT ON A DEFENSE.
11:18AM 8 THE COURT: HOW DO WE PROTECT THEIR INTEREST, IF AT
11:18AM 9 ALL, IF THEY INDICATE THAT THEY, THE AGENCIES, HAVE INTERNAL
11:18AM 10 REGULATIONS OR THEY HAVE RULES WHERE THEY CANNOT, THEY CAN --
11:18AM 11 THEY'RE FORBIDDEN TO RELEASE CERTAIN --
11:18AM 12 MR. CAZARES: BUT THEY'RE NOT. THAT'S GREAT --
11:18AM 13 THE COURT: I BEG YOUR PARDON. LET ME FINISH MY
11:18AM 14 QUESTION SO YOU'LL BE FULLY INFORMED.
11:18AM 15 MR. CAZARES: I APOLOGIZE.
11:18AM 16 THE COURT: SO HOW DO THEY PROTECT THEMSELVES? HOW
11:18AM 17 DO THEY PROTECT THEMSELVES FROM SOMEONE ELSE, THE CLIENT
11:18AM 18 PERHAPS SUING THEM, OR WHOEVER IT IS? HOW DO THEY DO THAT?
11:18AM 19 HOW CAN THEY RESPOND?
11:18AM 20 MR. CAZARES: THEY'D POINT TO THEIR COUNSEL, WHO
11:18AM 21 WOULD BE THE DEPARTMENT OF JUSTICE, AND THE COURT ORDER ISSUED
11:19AM 22 FROM THIS COURT. FOR EXAMPLE, AND I WAS GOING TO GET TO THIS,
11:19AM 23 IN THE S.E.C. CASE THE BACK AND FORTH DELIBERATIONS RESULTED IN
11:19AM 24 ONLY 166 DOCUMENTS BEING PRODUCED.
11:19AM 25 IN APRIL -- THIS PAST APRIL IT REACHED A POINT WHERE WE

11:19AM 1 PROPOSED MOTIONS TO COMPEL TO BOTH AGENCIES. WE SUBMITTED
11:19AM 2 DRAFT MOTIONS TO COUNSEL.
11:19AM 3 NOW, THOSE MOTIONS DON'T GO DIRECTLY TO THE AGENCIES.
11:19AM 4 THEY GO TO THE CIVIL DIVISION OF THE SAME U.S. ATTORNEY'S
11:19AM 5 OFFICE BECAUSE THE U.S. ATTORNEY'S OFFICE REPRESENTS THE
11:19AM 6 AGENCIES IN RESPONSE TO THOSE SUBPOENAS.
11:19AM 7 AGAIN, WE ENGAGED IN AGAIN SOME MEET AND CONFERS AND
11:19AM 8 BROUGHT THE AGENCIES BACK TO THE TABLE TO AT LEAST DISCUSS THE
11:19AM 9 ISSUE, BUT AGAIN, IT'S BEEN A COUPLE OF MONTHS. WE DON'T HAVE
11:19AM 10 ADDITIONAL DOCUMENTS AS A RESULT OF THOSE DISCUSSIONS AND
11:19AM 11 ADDITIONAL MEET AND CONFERS EVEN AFTER A PROPOSAL ABOUT MOTIONS
11:19AM 12 TO COMPEL AND BRING THE AGENCIES TO COURT IN THE CIVIL CASE.
11:19AM 13 THAT'S MY POINT, AND I THINK THAT'S COUNSEL'S POINT FOR
11:19AM 14 MS. HOLMES. THIS PROCESS OF DISCUSSION, MEET AND CONFER, TRY
11:19AM 15 TO REACH AGREEMENT OVER THIS LITANY OF CONCERNS THE AGENCIES
11:20AM 16 RAISE, WHICH ARE LEGITIMATE CONCERNS BUT NOT LEGITIMATE
11:20AM 17 CONCERNS IN A CRIMINAL CASE AT LEAST BROUGHT IN PART ON BEHALF
11:20AM 18 OF THE FDA.
11:20AM 19 THE GOVERNMENT DOESN'T DISCLAIM THE FACT THAT THE FDA OIG
11:20AM 20 WERE PART OF THE CRIMINAL PROSECUTION TEAM. THEY DID
11:20AM 21 INTERVIEWS OF 17 EMPLOYEES FROM THE FDA AND CMS IN THE COURSE
11:20AM 22 OF THE CRIMINAL INVESTIGATION, AND, OF COURSE, AS THE COURT
11:20AM 23 KNOWS, 300,000 OR SO DOCUMENTS PRODUCED BY THE TWO AGENCIES.
11:20AM 24 THAT'S ACCESS. IT'S NOT WHETHER OR NOT YOU HAVE ACCESS TO
11:20AM 25 ANY DOCUMENT THAT THE AGENCIES HAVE, INCLUDING ATTORNEY-CLIENT

11:20AM 1 PRIVILEGE. OF COURSE THEY HAVE A PRIVILEGE THEY CAN WITHHOLD
11:20AM 2 EVEN IN RESPONSE TO A RULE 16 ORDER.

11:20AM 3 BUT THAT CAN BE ADDRESSED FAIRLY EASILY AND MECHANICALLY,
11:20AM 4 YOUR HONOR. BOTH AGENCIES HAVE GENERAL COUNSEL'S OFFICES.
11:20AM 5 ATTORNEYS CAN BE IDENTIFIED.

11:21AM 6 THE COURT: PARDON ME FOR INTERRUPTING YOU. I
11:21AM 7 WONDER IF IT MAKES SENSE FOR THIS COURT TO ISSUE AN ORDER THAT
11:21AM 8 INDICATES TO THESE AGENCIES AND THESE GOOD LAWYERS WHO
11:21AM 9 REPRESENT THEIR AGENCIES TO PLEASE TELL THE COURT AND INFORM
11:21AM 10 THE COURT IN WRITING WHAT THEIR INTENT IS AS TO THESE SIX
11:21AM 11 CATEGORIES AND RELEASING THIS INFORMATION? AND THEN WE CAN
11:21AM 12 BE -- CUT THROUGH THE OPACITY OF WHATEVER IT IS THAT IS HERE
11:21AM 13 AND FIND OUT WHAT IT IS THAT THEY'RE GOING TO RELEASE AND WHY
11:21AM 14 NOT.

11:21AM 15 MR. BOSTIC, THAT MIGHT BE HELPFUL TO US AND GET THEM TO
11:21AM 16 RESPOND TO US IN TEN DAYS, OR SOMETHING LIKE THAT, SO AT LEAST
11:21AM 17 WE CAN UNDERSTAND AND THEY UNDERSTAND THAT AT LEAST THE COURT'S
11:21AM 18 FOCUS IS I WANT TO KNOW WHAT YOU'RE GOING TO DO WITH THESE SIX
11:21AM 19 REQUESTS AND THEY'RE RESPONDING NOW. IF WE GET THE SAME THINGS
11:21AM 20 BACK, THEY PROBABLY WILL BE TEMPTING THE COURT TO ISSUE AN
11:21AM 21 ORDER.

11:21AM 22 MR. WADE: YOUR HONOR, IF I MIGHT. WE MIGHT ALSO
11:21AM 23 INQUIRE IN SUCH AN ORDER WHETHER THE OBSTACLES THAT ARE SET
11:21AM 24 FORTH IN THIS CORRESPONDENCE ARE REMOVED BY AN ORDER FROM THE
11:22AM 25 COURT TO COUNSEL'S POINT.

11:22AM 1 THE COURT: WELL, THEY'LL TELL US THAT.

11:22AM 2 MR. WADE: YEAH.

11:22AM 3 THE COURT: WHY CAN'T YOU RESPOND TO THIS? AND WHEN

11:22AM 4 CAN YOU EXPECT?

11:22AM 5 THAT GETS YOU OFF THE HOOK, MR. BOSTIC. NOT THAT YOU'RE

11:22AM 6 AFRAID OF BEING ON THE HOOKS. I KNOW YOU'RE COURAGEOUS, BUT AT

11:22AM 7 LEAST IT PROVIDES AN OPPORTUNITY TO HAVE SOME DIRECT

11:22AM 8 COMMUNICATION FROM MS. DYER, MS. NORTON.

11:22AM 9 MR. BOSTIC: I APPRECIATE THE COURT'S PRAGMATIC

11:22AM 10 THINKING.

11:22AM 11 MY CONCERN WITH THAT APPROACH IS THAT I THINK IT STILL

11:22AM 12 ALLOWS THE DEFENSE IMPROPERLY TO END RUN AROUND RULE 17. AND

11:22AM 13 THE COURT ASKED A VERY GOOD QUESTION, HOW DO WE PROTECT THE

11:22AM 14 AGENCY'S INTEREST HERE? HOW DO WE ALLOW THEM TO SPEAK UP FOR

11:22AM 15 THEMSELVES? TO DEFEND THEIR POSITIONS?

11:22AM 16 THE RULE THAT ALLOWS FOR THAT IS RULE 17. THAT'S THE RULE

11:22AM 17 THAT DEFENDANTS USE TO BRING THIRD PARTIES BEFORE THE COURT

11:22AM 18 WHEN NECESSARY TO COMPEL THEM TO PRODUCE DOCUMENTS.

11:22AM 19 THE DEFENSE HERE HAS DECIDED NOT TO PURSUE THAT ROUTE.

11:22AM 20 THAT LEAVES US WITHOUT A MECHANISM TO BRING THOSE AGENCIES HERE

11:22AM 21 TO ANSWER FOR THEMSELVES.

11:23AM 22 MY CONCERN IS THAT, AGAIN USING THE PROSECUTION AS AN

11:23AM 23 INTERMEDIARY THAT WAY, WE'RE HAPPY TO DO WHAT WE CAN, AS I

11:23AM 24 SAID, TO FACILITATE THE PRODUCTION OF THOSE DOCUMENTS

11:23AM 25 VOLUNTARILY, BUT TO USE US TO ORDER THE AGENCIES TO DO

11:23AM 1 SOMETHING THROUGH US, MY CONCERN IS THAT IT'S -- THAT IT'S NOT
11:23AM 2 WHAT THE LAW INTENDED WHEN IT CAME UP WITH THE SCHEME THAT
11:23AM 3 INCLUDES RULE 17.

11:23AM 4 THE COURT: I APPRECIATE THAT. AND I THINK COUNSEL,
11:23AM 5 AS YOU KNOW, IS SUGGESTING, JUDGE, YOU KNOW, THE SHORT ROAD TO
11:23AM 6 ALL OF THIS IS FOR THE COURT TO FIND THAT THE GOVERNMENT IS
11:23AM 7 APPROPRIATELY SITUATED IN A POSITION TO PROVIDE THIS
11:23AM 8 INFORMATION GIVEN THE GUIDANCE OF SANTIAGO AND OTHER CASES, AND
11:23AM 9 THE COURT SHOULD MAKE THAT FINDING TODAY, AND THEN ORDER THE
11:23AM 10 GOVERNMENT TO PROCEED, AND THEN WE'LL SEE WHAT OBJECTIONS
11:23AM 11 HAPPEN.

11:23AM 12 YOU KNOW, THAT HAS SOME CURRENCY. THAT DOES HAVE SOME
11:23AM 13 ARGUMENT GOING ITS WAY.

11:23AM 14 I'M PAUSING HERE NOT BECAUSE THERE'S ANY RELUCTANCE TO
11:24AM 15 ISSUE SUCH AN ORDER, BUT THE ONLY PAUSE I HAVE IS THAT YOU HAVE
11:24AM 16 ENGAGED A PROCESS NOW. WE HAVE SOME LETTERS THAT SUGGEST THAT
11:24AM 17 THIS IS ONGOING. I'D LIKE TO KEEP THAT ONGOING IF I CAN BUT
11:24AM 18 NOT TO THE EXTENT THAT IT, THAT IT JEOPARDIZES ANYBODY'S
11:24AM 19 PREJUDICES, ANYBODY'S RIGHTS HERE TO A FAIR AND JUST AND SPEEDY
11:24AM 20 TRIAL. THAT INCLUDES THE GOVERNMENT AS WELL. I WANT TO MAKE
11:24AM 21 SURE THAT THIS INFORMATION IS, IF IT'S RELEVANT, IF IT'S
11:24AM 22 LEGALLY AVAILABLE TO THE DEFENSE, THAT THEY HAVE IT.

11:24AM 23 YOUR EFFORTS TO ADVANCE THAT, NOTWITHSTANDING ANY 17
11:24AM 24 MOTION OR ANYTHING ELSE, I APPRECIATE THAT. I THOUGHT WHEN YOU
11:24AM 25 DID THIS A MONTH AGO WHEN WE WERE TALKING THAT, WELL, THIS

11:24AM 1 LOOKS GOOD. THIS IS THE GOVERNMENT ENGAGING THIS AND HOPEFULLY
11:24AM 2 WE'LL GET SOMETHING BACK. I DID NOT -- I'M NOT IN THE BELTWAY
11:24AM 3 SO I'M NOT USED TO THESE TYPE OF LETTERS. YOU MIGHT BE.

11:25AM 4 MR. WADE: SOMETIMES PROSECUTORS ARE STRENGTHENED BY
11:25AM 5 ORDERS FROM THE COURT AND IT CAN HELP CUT THROUGH --

11:25AM 6 THE COURT: MY SENSE IS EVERYONE IS WHO RECEIVES
11:25AM 7 ONE.

11:25AM 8 MR. WADE: I'VE SENSED THAT PATTERN AS WELL, YOUR
11:25AM 9 HONOR.

11:25AM 10 THE COURT: THANK YOU. ANYTHING FURTHER? I DIDN'T
11:25AM 11 MEAN TO CUT YOU OFF, MR. CAZARES.

11:25AM 12 MR. CAZARES: YOUR HONOR, UNLESS YOU HAVE A QUESTION
11:25AM 13 AGAIN, I DON'T THINK THAT ENGAGING THE AGENCIES IN A DEBATE
11:25AM 14 REGARDING WHETHER OR NOT THEY FEEL THAT THEY CAN PRODUCE
11:25AM 15 MATERIALS LAWFULLY OR REFUSE TO PRODUCE MATERIALS LAWFULLY IN
11:25AM 16 RESPONSE TO A RULE 16 ORDER IN A CRIMINAL CASE IS APPROPRIATE.
11:25AM 17 I UNDERSTAND WE MAY BE THERE ANYWAY, BUT TO ME THAT'S NOT WHAT
11:25AM 18 HAPPENED IN BRYAN. BRYAN WAS DEALING WITH THE I.R.S., NOT THE
11:25AM 19 DEPARTMENT OF JUSTICE. THAT'S NOT WHAT HAPPENED IN GRACE.
11:25AM 20 AGAIN, YOU'RE DEALING WITH THIRD PARTY FEDERAL AGENCIES.
11:25AM 21 THAT'S MY CONCERN, YOUR HONOR.

11:25AM 22 THE COURT: OKAY. THANK YOU VERY MUCH.

11:25AM 23 MR. WADE: THANK YOU, YOUR HONOR.

11:25AM 24 THE COURT: WHAT ELSE WOULD YOU LIKE ME TO KNOW?

11:25AM 25 MR. WADE: NOTHING.

11:25AM 1 IF THERE'S ONE SMALL POINT THAT I COULD ADDRESS ON --

11:26AM 2 SETTING ASIDE THE MOTION AND COMING BACK TO SOME OF THE INITIAL

11:26AM 3 COMMENTS THAT WERE MADE WITH REGARD TO DISCOVERY ISSUES BECAUSE

11:26AM 4 THEY, TOO, RELATE TO THE, YOU KNOW, THE TRIAL DATE THAT IS

11:26AM 5 BEFORE US, I JUST WANT TO MAKE SURE THAT THE RECORD HERE IS

11:26AM 6 CLEAR THAT SOME OF THESE REMAINING OBLIGATIONS -- I DON'T EVEN

11:26AM 7 KNOW WHAT A GIGABYTE OF DATA IS, YOUR HONOR.

11:26AM 8 MY GUESS IS THAT IF YOU PRINTED IT OUT IT WOULD FILL THIS

11:26AM 9 ROOM. WE HAVE A LOT OF MATERIAL LEFT TO GO. I KNOW THE

11:26AM 10 GOVERNMENT HAS BEEN WORKING DILIGENTLY. THIS TANTING PROCESS

11:26AM 11 IS ONGOING.

11:26AM 12 JUST TO MAKE CLEAR TO THE COURT, IT APPEARS THAT THERE

11:26AM 13 COULD BE MONTHS OF THAT STILL AHEAD. THE NUMBER OF DOCUMENTS

11:26AM 14 THAT THEY IDENTIFIED WERE IN THE HUNDREDS OF THOUSANDS. THE

11:26AM 15 PAGES ARE I THINK TWO AND A HALF MILLION PAGES OF DOCUMENTS.

11:26AM 16 SO WE WILL CONFER WITH THE GOVERNMENT. WE WILL COME BACK.

11:26AM 17 WE'LL FIND A SCHEDULE THAT WE THINK WILL KEEP THIS CASE ON

11:26AM 18 TRACK FOR THE TRIAL DATE THAT THE COURT HAS SET FOR THE MATTER,

11:26AM 19 BUT WE HAVE A LOT OF WORK TO DO.

11:27AM 20 TO THE EXTENT THAT THE COURT CONTINUES TO ENCOURAGE PROMPT

11:27AM 21 AND EXPEDITIOUS FULFILLMENT OF OBLIGATIONS, BY ALL MEANS,

11:27AM 22 THAT'S NEWS TO THE EARS OF THE DEFENSE.

11:27AM 23 WE WANT TO BE READY AND ORGANIZED TO PRESENT A COHERENT

11:27AM 24 DEFENSE TO THIS COURT AND IN AN EXPEDITIOUS WAY WHEN THIS TRIAL

11:27AM 25 OCCURS, AND WE HAVE A LOT OF WORK TO DO TO GET THERE.

11:27AM 1 THE COURT: THANK YOU VERY MUCH. MR. BOSTIC.

11:27AM 2 MR. BOSTIC: ONLY TO SAY THAT THE GOVERNMENT WANTS

11:27AM 3 THE SAME THINGS. WE WANT THINGS TO PROCEED EXPEDITIOUSLY.

11:27AM 4 ON THE TAINTING REVIEW, LET ME JUST CLARIFY THAT THE

11:27AM 5 DEFENSE -- MY UNDERSTANDING IS THAT THE DEFENSE NOW HAS ALL OF

11:27AM 6 THE DOCUMENTS ENCOMPASSED BY THAT FILTER REVIEW. SO THE

11:27AM 7 ONGOING REVIEW IS ONLY DELAYING THE TRIAL TEAM, THE

11:27AM 8 GOVERNMENT'S TRIAL TEAM'S ACCESS TO THOSE MATERIALS AND NOT

11:27AM 9 DELAYING THE DEFENSE'S ACCESS.

11:27AM 10 ON THE --

11:27AM 11 MR. WADE: I'M SORRY.

11:27AM 12 MR. BOSTIC: ON THE FDA AND CMS DOCUMENTS, I AGREE

11:27AM 13 WITH THE COURT THAT I THINK PROVIDING SOME ADDITIONAL TIME FOR

11:28AM 14 THE PROCESS TO PLAY OUT MAKES SENSE. I THINK THAT THE ISSUES

11:28AM 15 RAISED IN THE RESPONSE LETTERS FROM THE FDA AND CMS ARE

11:28AM 16 SURMOUNTABLE. I THINK WE CAN FIND SOLUTIONS TO THOSE ISSUES.

11:28AM 17 AND LIKE I SAID BEFORE, I'M OPTIMISTIC ABOUT BEING ABLE TO

11:28AM 18 OBTAIN THE VAST MAJORITY OF THOSE DOCUMENTS FOR THE DEFENSE.

11:28AM 19 THE COURT: WELL, THANK YOU. I HOPE YOUR OPTIMISM

11:28AM 20 WAS WELL PLACED WITH THOSE AGENCIES.

11:28AM 21 SO WHILE YOU WERE SPEAKING -- YOU DON'T HAVE TO LEAVE THE

11:28AM 22 LECTERN YET BECAUSE I MIGHT WANT YOUR THOUGHTS ON THIS -- I DID

11:28AM 23 OPINE THAT THE COURT COULD ISSUE AN ORDER ASKING MS. NORTON AND

11:28AM 24 MS. DYER TO GIVE SOME CLARITY AS TO THEIR LETTERS.

11:28AM 25 I DON'T WANT TO HAVE ANY DIRECT CONTACT OR COMMUNICATION

11:28AM 1 WITH THEM, IF YOU WILL, THOSE TWO LAWYERS. I DON'T THINK
11:28AM 2 THAT'S APPROPRIATE AT THIS POINT.
11:28AM 3 BUT I DO IN SOME MEASURE WANT TO GET THAT MESSAGE TO THEM.
11:28AM 4 I WANT TO -- WHAT I'D LIKE TO DO IS TO ALLOW THIS ENGAGEMENT
11:28AM 5 THAT MR. BALWANI AND HIS TEAM HAS PUT TOGETHER TO GO FORWARD
11:29AM 6 FOR A BRIEF PERIOD OF TIME JUST TO ALLOW IT TO COME TO FRUITION
11:29AM 7 OR IF IT CAN HAPPEN IN SHORT ORDER.
11:29AM 8 BUT I DO WANT TO CONVEY TO THESE AGENCIES MY CONCERN ABOUT
11:29AM 9 THE OBJECTIONS THAT THEY RAISE, AND I THINK COUNSEL IS
11:29AM 10 ABSOLUTELY RIGHT THAT THE BEST WAY TO ACCOMPLISH THAT IS
11:29AM 11 THROUGH A DIRECT ORDER TO HAVE THEM PRODUCE THE DOCUMENTS AND
11:29AM 12 THEN THEY CAN OBJECT OR THEY CAN SAY WHATEVER IT IS. MAYBE
11:29AM 13 THAT'S WHEN THEIR LAWYERS COME IN.
11:29AM 14 AND THEN YOU CAN THROW YOUR HANDS UP, MR. BOSTIC, YOU AND
11:29AM 15 MS. SCHENK, AND CAN SAY, YOU KNOW, THAT'S WHAT THE JUDGE SAID
11:29AM 16 SO PUT YOUR OBJECTIONS IN NOW. I CAN DO THAT.
11:29AM 17 BUT AS I'VE TOLD YOU, I WILL GIVE YOU AN OPPORTUNITY TO
11:29AM 18 HAVE YOUR GOOD EFFORTS GO FORWARD AND YOU COMMUNICATE WITH
11:29AM 19 THESE INDIVIDUALS AND IF THEY WANT TO TELL US WHAT THEIR
11:30AM 20 OBJECTIONS ARE IN SOME SHORT ORDER, AND BY THAT I MEAN IF WE
11:30AM 21 CAN GET SOMETHING FROM THEM IN TWO WEEKS THAT TELL US WHAT
11:30AM 22 THEY'RE GOING TO DO OR WHY THEY'RE NOT GOING TO DO IT, THAT
11:30AM 23 WOULD INFORM ALL OF US, AND IT WOULD INFORM ME AS TO WHAT I
11:30AM 24 SHOULD DO NEXT AND HOW WE SHOULD PROCEED NEXT. THAT WOULD BE
11:30AM 25 VERY INSTRUCTIVE TO ME.

11:30AM 1 I UNDERSTAND RULE 16. MR. CAZARES EDUCATED US A LITTLE
11:30AM 2 BIT MORE ON THAT THIS MORNING. I UNDERSTAND IT. I UNDERSTAND
11:30AM 3 THE SANTIAGO CASES THAT WERE PRESENTED BY THE DEFENSE. I THINK
11:30AM 4 THERE IS SOME GOOD MERIT TO THEM, CANDIDLY.
11:30AM 5 LET ME JUST TURN TO YOU, MR. BOSTIC, AND YOUR TEAM AND
11:30AM 6 JUST TELL YOU I THINK THEY'RE ON SOME SOLID FOOTING IN THOSE
11:30AM 7 CASES.
11:30AM 8 HE'S GOING TO SAY, WELL, ISSUE THE ORDER, JUDGE, AND I
11:30AM 9 THINK I'VE TOLD YOU WHY I'M NOT GOING TO DO THAT. I'M GOING TO
11:30AM 10 ALLOW THIS PROCESS TO GO FORWARD AND SEE WHAT YOU CAN REVEAL IN
11:31AM 11 A COUPLE OF WEEKS AND HOPEFULLY THAT WILL BE FRUITFUL.
11:31AM 12 WHY DON'T WE SET A STATUS HEARING, AND I'VE ASKED YOU TO
11:31AM 13 STAY AT THE LECTERN TO GIVE ME YOUR THOUGHTS ON WHEN THAT
11:31AM 14 SHOULD BE JUST TO FOLLOW UP ON THIS.
11:31AM 15 WHAT I'LL DO IS I'LL CONTINUE THE HEARING ACTUALLY, LET'S
11:31AM 16 JUST CONTINUE THE HEARING, I'LL CALL IT THAT, BECAUSE THE COURT
11:31AM 17 HASN'T MADE A DECISION AS TO WHETHER OR NOT IT IS GOING TO
11:31AM 18 ISSUE AN ORDER, BUT I THINK I'VE TOLD YOU WHAT MY THOUGHT IS.
11:31AM 19 SO WHAT WOULD WORK FOR YOU? AND I WANT TO GIVE YOU SOME
11:31AM 20 CONTROL, MR. BOSTIC, BECAUSE YOU HAVE TO DEAL WITH THE
11:31AM 21 BUREAUCRACY, IF YOU WILL.
11:31AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR. WE'RE HAPPY TO
11:31AM 23 PASS ALONG THE COURT'S THOUGHTS TO THE AGENCIES AND SEE WHAT
11:31AM 24 PROGRESS WE CAN MAKE.
11:31AM 25 THE COURT: GREAT.

11:31AM 1 MR. BOSTIC: AT THE SAME TIME WE WILL WORK WITH THE
11:31AM 2 DEFENSE ON A PROTECTIVE ORDER THAT WILL ADDRESS THE AGENCY'S
11:31AM 3 CONCERNs.

11:31AM 4 THE COURT: GREAT.

11:31AM 5 MR. BOSTIC: AND THE POSSIBILITY OF GETTING A WAIVER
11:31AM 6 THAT WILL ADDRESS THE AGENCY'S CONCERNs AND THE POSSIBILITY OF
11:31AM 7 GETTING A WAIVER THAT WILL ADDRESS OTHER AGENCY CONCERNs. TO
11:31AM 8 ALLOW TIME FOR THOSE THINGS TO TAKE PLACE I WOULD ASK FOR
11:32AM 9 THREE WEEKS IF THE COURT IS WILLING TO GIVE IT.

11:32AM 10 MR. WADE: I FEEL LIKE I'M LOOKING AT FAMILY FEUD
11:32AM 11 HERE, YOUR HONOR, WITH THE RED X'S ON THE BOARD.

11:32AM 12 THE COURT: OH, IGNORE THOSE. THEY DON'T MEAN A
11:32AM 13 THING. HOW ABOUT THE WEEK OF THE 16TH OR THE 29TH?

11:32AM 14 MR. BOSTIC: EITHER WORKS FOR THE GOVERNMENT, YOUR
11:32AM 15 HONOR. THE LATER IT IS, THE MORE WE'LL BE ABLE TO ACCOMPLISH
11:32AM 16 IN THE MEANTIME, BUT I UNDERSTAND THE COURT AND THE DEFENSE
11:32AM 17 WANT THINGS TO MOVE QUICKLY.

11:32AM 18 MR. WADE: IT WOULD SEEM TO ME THE 16TH IS PROBABLY
11:32AM 19 THE BEST DATE, YOUR HONOR.

11:32AM 20 THE COURT: DO YOU WANT TO CONSULT WITH YOUR
11:32AM 21 COLLEAGUES?

11:32AM 22 MR. WADE: YEAH, LET ME CONSULT WITH MY COLLEAGUES
11:32AM 23 AND MY CALENDAR.

11:32AM 24 THE COURT: THAT'S FINE.

11:32AM 25 (PAUSE IN PROCEEDINGS.)

11:33AM 1 THE COURT: LET ME OFFER THE 17TH, THE 18TH, OR THE
11:33AM 2 19TH, OR AGAIN THE 30TH OR 31ST.

11:33AM 3 MR. WADE: HAVING SEEN SOME LAWYERS HAD THEIR PHONES
11:33AM 4 RING OUT THERE, I MADE THE DECISION TO TURN MINE OFF. SO WITH
11:33AM 5 THE COURT'S INDULGENCE, I'M JUST LOGGING ON TO MY SCHEDULE. I
11:33AM 6 THINK THE 17TH WOULD WORK FOR THE DEFENSE.

11:34AM 7 MR. CAZARES: YES, YOUR HONOR.

11:34AM 8 MR. BOSTIC: AND THAT'S FINE FOR THE GOVERNMENT.

11:34AM 9 THANK YOU.

11:34AM 10 THE COURT: OKAY. NOW, LET ME ASK TIMING FOR TRAVEL
11:34AM 11 TIME. WHAT IS BEST FOR YOU ALL?

11:34AM 12 MR. WADE: I THINK IN AN AFTERNOON HEARING, AN EARLY
11:34AM 13 AFTERNOON HEARING. WITH THE COURT'S INDULGENCE.

11:34AM 14 THE COURT: SURE.

11:34AM 15 (DISCUSSION AMONGST COUNSEL OFF THE RECORD.)

11:34AM 16 MR. WADE: ACTUALLY, YOUR HONOR, 10:00 A.M. LIKE THE
11:34AM 17 HEARING TODAY WOULD WORK WELL.

11:34AM 18 MR. BOSTIC: THAT'S FINE.

11:34AM 19 MR. CAZARES: THAT'S FINE.

11:34AM 20 THE COURT: LET'S DO THAT.

11:34AM 21 MR. WADE: YOUR HONOR, IF I MAY MAKE ONE MORE
11:34AM 22 SUGGESTION JUST FOR CASE MANAGEMENT PURPOSES.

11:34AM 23 MAYBE IF WE WERE TO HAVE A DATE BY WHICH WE SUBMIT A
11:34AM 24 PROPOSED SCHEDULED TO THE COURT IN ADVANCE OF THAT AND THAT WAY
11:34AM 25 AT THAT HEARING WE CAN HAVE THE CALENDARS OUT AND TRY AND

11:34AM 1 RESOLVE ANY DISPUTES THAT WE MAY HAVE.

11:34AM 2 THE COURT: THAT'S HELPFUL. THANK YOU FOR THAT.

11:34AM 3 THAT WOULD BE HELPFUL.

11:34AM 4 MR. BOSTIC: ARE WE TALKING ABOUT A PROPOSED

11:34AM 5 PRETRIAL CALENDAR?

11:34AM 6 MR. WADE: YES.

11:34AM 7 MR. BOSTIC: I THINK THAT'S A GOOD IDEA.

11:34AM 8 THE COURT: OKAY. THANK YOU. I APPRECIATE YOU

11:34AM 9 ADVANCING THAT. ALSO, AFTER YOU HAVE YOUR MEET AND CONFER, AND

11:35AM 10 I ANTICIPATE IT'S GOING TO BE JUST EMINENTLY SUCCESSFUL, SHOULD

11:35AM 11 YOU NEED TO ADJUST THE 17TH, THAT IS, TO MOVE IT TO TAKE IT OFF

11:35AM 12 CALENDAR BECAUSE EVERYONE IS SATISFIED, JUST LET MS. KRATZMANN

11:35AM 13 KNOW AND WE CAN MAKE ANY ADJUSTMENTS THAT WE NEED ON THAT.

11:35AM 14 THAT'S ALWAYS OPEN.

11:35AM 15 MR. WADE: OPTIMISM SPRINGS ETERNAL, YOUR HONOR.

11:35AM 16 THE COURT: IT DOES. IT DOES. EVEN BOSTON WINS A

11:35AM 17 WORLD SERIES NOW AND THEN. ANYTHING CAN HAPPEN. ANYTHING

11:35AM 18 FURTHER?

11:35AM 19 MR. BOSTIC: JUST ONE HOUSEKEEPING MATTER.

11:35AM 20 THE COURT: YES.

11:35AM 21 MR. BOSTIC: I BELIEVE, OF COURSE, THE PARTIES ARE

11:35AM 22 EACH CONTINUING THEIR INVESTIGATIONS AND REVIEW OF DISCOVERY.

11:35AM 23 IT MIGHT BE APPROPRIATE TO EXCLUDE TIME THROUGH THE TRIAL DATE.

11:35AM 24 THE COURT: THANK YOU. I WAS GOING TO DO THAT. WE

11:35AM 25 HAVE A TRIAL DATE SET. IT'S THE COURT'S INTENT THEN, BASED ON

11:35AM 1 OUR DISCUSSION HERE, AND WE'RE ONLY AT DISCOVERY, BUT I WILL
11:36AM 2 EXCLUDE TIME TO ALLOW FOR EFFECTIVE PREPARATION OF COUNSEL.
11:36AM 3 TIME IS EXCLUDED TO OUR TRIAL DATE FOR BOTH DEFENDANTS IN THIS
11:36AM 4 MATTER.

11:36AM 5 ALL RIGHT. THANK YOU VERY MUCH.

11:36AM 6 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:36AM 7 MR. WADE: THANK YOU, YOUR HONOR.

11:36AM 8 MR. CAZARES: THANK YOU.

11:36AM 9 THE COURT: AND WE HAVE AN S.E.C. CASE. SHOULD WE
11:36AM 10 CALL THAT NOW BEFORE EVERYONE LEAVES?

11:36AM 11 MS. LAMARCA: SURE.

11:36AM 12 THE COURT: THANK YOU FOR YOUR PATIENCE.

11:36AM 13 MS. LAMARCA: SUSAN LAMARCA WITH THE S.E.C.

11:36AM 14 THE COURT: THANK YOU. GOOD MORNING.

11:36AM 15 MR. KATZ: GOOD MORNING, YOUR HONOR. MARC KATZ FOR
11:36AM 16 THE S.E.C.

11:36AM 17 THE COURT: THANK YOU. NICE TO SEE YOU AGAIN.

11:36AM 18 MR. CAZARES: GOOD MORNING AGAIN, YOUR HONOR,
11:36AM 19 STEPHEN CAZARES FOR THE MR. BALWANI.

11:36AM 20 THE COURT: THANK YOU. GOOD MORNING. SO WHAT
11:36AM 21 SHOULD WE DO IN THIS CASE?

11:36AM 22 MS. LAMARCA: I THINK THE ONLY MATTER THAT WE HAVE
11:36AM 23 IN OUR JOINT STATEMENT WAS THE CONFIRMATION OF DATES THAT WE
11:36AM 24 AGREED COULD BE PUSHED OUT ANOTHER I THINK IT WAS 120 DAYS THE
11:36AM 25 COURT SET FOR THE CUTOFF OF REGULAR DISCOVERY, AND WE CAN HAD

11:36AM 1 HAD A LATTER EXPERT DISCOVERY DATE AND SO WE WANTED TO MAKE
11:36AM 2 SURE THAT THE COURT WENT AHEAD AND ORDERED THAT DATE.

11:36AM 3 MR. CAZARES: THAT'S ACCEPTABLE, YOUR HONOR, YES.

11:37AM 4 MS. LAMARCA: GREAT. THANK YOU, YOUR HONOR.

11:37AM 5 THE COURT: THANK YOU VERY MUCH. GOOD SEEING YOU
11:37AM 6 ALL. THANK YOU.

11:37AM 7 MR. DOWNEY: THANK YOU, YOUR HONOR.

11:37AM 8 THE CLERK: COURT IS ADJOURNED.

11:37AM 9 (COURT CONCLUDED AT 11:37 A.M.)

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3 CERTIFICATE OF REPORTER
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7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.

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IRENE RODRIGUEZ, CSR, RMR, CRR
17 CERTIFICATE NUMBER 8074
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19 DATED: JULY 2, 2019
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